Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the Fourth Circuit's approach in analyzing the important financial factor with respect to Eleventh Amendment immunity created and sharpened a conflict among the Circuits regarding the proper approach to be utilized in examining this factor which must be resolved by the Supreme Court?

2. Is an actual financial examination of the circumstances of the case the proper approach to be utilized in assessing the important financial factor in an Eleventh Amendment immunity analysis?

3. When correctly analyzed, is the Ports Authority entitled to Eleventh Amendment protection?

LIST OF PARTIES AND RULE 29.1 LIST

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The petitioners, Fred W. Ristow and Susan M. Ristow, pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court

of Appeals for the Fourth Circuit entered in this action on June 13, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 27 F. 3d 84 (4th Cir. 1994). It is reprinted in the appendix ("App.") at A1-30. The District Court's unpublished decision and order granting dismissal is reprinted at App. B1-6.

JURISDICTION

The Court of Appeals entered judgment on June 13, 1994. This petition for writ of certiorari was filed within 90 days of that date, and this Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. Sec. 1254 (1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision in-

volved is the Eleventh Amendment of United States Constitution, which is set forth at App. C1. The state statutes involved are numerous provisions contained in Section 54, Chapter 3, Articles 1 through 11 of the South Carolina Code Ann. These are set forth at App. C2-54.

STATEMENT OF THE CASE

A. THE PARTIES

The petitioners, Fred W. Ristow and Susan M. Ristow, hereinafter referred to as "Ristows" or "petitioners", are husband and wife and citizens of the State of Wisconsin. At all times material to this action, Fred W. Ristow was employed as a long haul truck driver and longshoreman by Donald Fanetti Trucking of Franklin, Wisconsin. (App. D3, 7)

The respondent, South Carolina

State Ports Authority, hereinafter referred to as the "Ports Authority", "Authority," or "respondent", is statutorily defined as an instrumentality of the State of South Carolina and is engaged in the business of managing and developing the ports and harbors in the State. See S.C. Code Ann., Sec. 54-3-130 at App. C6-10. The Ports Authority has the highly autonomous powers of a body corporate, including the power to sue and be sued, own property in its own name, borrow money, pay its expenses, etc. See S.C. Code Ann., Sec. 54-3-140 and Sec. 54-3-1020 at App. C10-18, 52-53.

The respondent designated in the caption as "The SS Unknown" is an unknown ship which was never identified and served. (App. A3) It was ulti-

mately dismissed as a defendant, and the Ristows did not appeal that dismissal.

B. THE INCIDENT IN QUESTION

On December 20, 1988, Fred W. Ristow, in the course of his employment as a truck driver for Fanetti Trucking, had transported a load of steel pipe on a flat bed truck to the Ports Authority's terminal in Charleston, South Carolina. (App. D8-9) Such pipe was to be picked up later at the terminal by an unknown ship and transported to Venezuela. (App. D9) While Mr. Ristow was standing on top of the load of pipe on the flat bed trailer and assisting in the unloading process, a fork lift driver employed by the Ports Authority, with Mr. Ristow in full view, picked up the entire load of pipe with the fork lift, lost control of the load while traveling in Mr. Ris-

tow's direction, and dropped one bundle of pipe. (App. D10-11) Mr. Ristow had to jump from the truck to avoid fatal injury. (App. D11) As he jumped, Mr. Ristow was struck in the left lower extremity by falling pipe and sustained severe injuries. (App. D11-14) Because of such injuries, he was required to undergo surgery and was unable to work for approximately one and one-half years. (App. D13)

The Ports Authority notified its insurance carrier, Lloyds of London, of the incident, and an insurance adjustment firm, Crawford and Company, of Charleston, South Carolina was retained to represent the Ports Authority and the insurance carrier. (App. D18-19; F2) A Crawford employee by the name of Lee Pitillo was assigned to handle this mat-

ter, and he led the Ristows to believe they could settle their claim for damages arising from the accident directly with Lloyds of London by dealing with him and without counsel. (App. D19; F2-3)

Subsequently, in July of 1990, the Ristows had a telephone conversation with Mr. Pitillo during which he offered to settle their claims for $75,000.00. (App. D19-20; F3) The Ristows accepted this offer and waited for the settlement check and paperwork to arrive. (App. D20-21; F3) Despite repeated reassurances by Mr. Pitillo, no settlement check ever arrived. (App. D21; F3) In December of 1990, the Ristows retained counsel to assist them with this matter.

C. PROCEEDINGS BELOW AND DISPOSITION

1. DISTRICT COURT

In December of 1991, the Ristows commenced this action in the U.S. District Court for the District of South Carolina, Charleston Division, against the Ports Authority and the unknown ship alleging ordinary negligence by the Ports Authority employee and vicarious liability for such negligence by the Ports Authority and the unknown ship.1 (App. D11-16) Mrs. Ristow's claim was for loss of consortium. (App. D16-18) The Ristows also asserted a breach of contract claim against the Ports Authority based upon the aforemention facts of the settlement agreement. (App. D18-22)

Federal jurisdiction was founded on diversity under 28 U.S.C. Sec. 1332 (a)

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1 The unknown ship was designated as "The SS Unknown," but the vessel was never identified and served.

and admiralty under 28 U.S.C. Sec. 1333. (App. D1-2) The parties consented to have the proceedings conducted before a U.S. Magistrate Judge pursuant to 28 U.S.C. Sec. 636 (c), and the case was assigned to the Hon. Robert S. Carr. (App. B1)

The Ports Authority moved for dismissal for lack of subject matter jurisdiction alleging, among other things, that the Ports Authority was an agency of the State of South Carolina and the suit was barred by the Eleventh Amendment of the U.S. Constitution. (App. E1-3) The Ristows argued the Ports Authority was not entitled to sovereign immunity based upon the application of the factors set forth by the Fourth Circuit in Ram Ditta v. Maryland National Capital Park and Planning Commission,

822 F. 2d 456 (4th Cir. 1987) The Ristows also urged the Court to adopt the reasoning of the District Court for the Southern District of New York expressed in Doris Trading Corporation v. The SS Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976) wherein the Court ruled the Ports Authority was not the alter ego of the State and therefore not entitled to sovereign immunity.

In an order entered on September 2, 1992, the District Court Magistrate Carr, presiding, granted the motion to dismiss holding that the Ports Authority was entitled to Eleventh Amendment immunity. (App. B5) The Court's decision was founded upon the cases of South Carolina State Ports Authority v. Seaboard AirLine R.R. Co., 124 F. Supp. 533 (D.S.C. 1954) and Coakley v. South

Carolina State Ports Authority, D.S.C. Case No. 2:87-1442-2 (UP 1988)2 as well as South Carolina statutory law concerning the Ports Authority and tort claims against the State. (App. B4 & 5) The claim against the unknown ship was dismissed due to a lack of service.3 (App. B5 & 6) A motion to alter judgment was subsequently denied (App. B7-9), and the Ristows then appealed.

2. COURT OF APPEALS

The United States Court of Appeals for the Fourth Circuit in an opinion by

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2 The Coakley decision is reproduced at App. G1-30.

3 The Ports Authority had also argued that it was not a citizen for diversity purposes and that the Ristows alleged only landside torts which did not fall within the admiralty jurisdiction. In light of its sovereign immunity decision, the Court did not address these other arguments.

the Honorable James M. Sprouse, Senior Circuit Judge, affirmed the District Court's dismissal of the action. (App. A1) The Fourth Circuit analyzed whether the Ports Authority was the alter ego of the State and was entitled to Eleventh Amendment immunity using the following four factors set forth in Ram Ditta: 1) whether the state treasury will be responsible for paying any judgment that might be awarded; 2) whether the entity exercises a significant degree of autonomy from the state; 3) whether it is involved in local versus statewide concerns; and 4) how the entity is treated as a matter of state law. (App. A6-7)

With respect to the first factor which it recognized as generally being the most important, the Court determined

the Ports Authority owes its existence and current position to funding by the State. (App. A7-9) The Court believed the State's withdrawal of excess Ports Authority funds and commingling of state funds with those of the Authority indicate that the Ports Authority's funds belong to the State and a recovery out of those funds would constitute one from the State treasury. (App. A10) The Court rejected the Ristows' argument that South Carolina statutory law insulated the state treasury from any Ports Authority indebtedness, including any judgment in favor of the Ristows. (App. A12-13)

The Fourth Circuit was not persuaded by the Ristows' assertions that the existence of insurance coverage, the absence of any obligation on the part of

the State to fund the Ports Authority or pay judgments against it, and the existence of the Ports Authority's own bank accounts and ability to borrow funds all weighed heavily against immunity. (App. A13-19) Although admitting the Ristows' arguments as to the existence of the Ports Authority's own funds and the absence of a provision committing the state treasury to fund the Authority or pay a judgment found support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir. 1989), aff'd on other grounds, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed 2d 264 (1990), the Court was persuaded by the Third Circuit's reasoning in Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F. 2d

413 (3rd Cir. 1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed 2d 370 (1987) (App. A14-16)

In the Police Benevolent Association case, the Third Circuit considered the status of the identical New York/New Jersey Ports Authority which the Second Circuit reviewed in Feeney and held that the symbiotic relationship between the states and the Authority supported a finding of Eleventh Amendment immunity. (App. A15-16) The Fourth Circuit favored what it described as the "broader" and "more practical" approach of the Third Circuit over that of the Second Circuit. (App. A17) Accordingly, the Court concluded the first factor of the Ram Ditta analysis supported Eleventh Amendment immunity. (App. A17)

As to the second Ram Ditta factor,

autonomy, the Court recited the considerable autonomous powers of the Ports Authority. (App. A20-22) However, it believed other statutory provisions made the Ports Authority beholden to the State and tipped this factor in favor of immunity. (App. A23) The Court determined the third factor with respect to involvement in state versus local concerns favored immunity because it believed the Ports Authority's functions extended to all regions of the State. (App. A24) The final prong of the analysis, the treatment of the entity as a matter of state law, was found to be inconclusive. (App. A25-26)

Two other factors also influenced the Court's decision. First, the District Courts for South Carolina in the aforementioned Coakley and Seaboard Air

Line cases held that the Ports Authority was entitled to immunity. (App. A26) Secondly, the Ports Authority is included in the South Carolina State Tort Claims Act, and the State has provided a state court forum for tort claims. (App. A26-27) The Fourth Circuit concluded the Ports Authority was the State's alter ego and thus was entitled to Eleventh Amendment immunity. (App. A27)4 The Court rejected the Ristows' admiralty argument as well. (App. A28-30)

REASONS FOR GRANTING THE WRIT AND ARGUMENT

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4 Because the Court found the Authority was entitled to sovereign immunity protection, it did not have to address the diversity jurisdiction issue which the Ristows had also raised. (App. A27)

I. THE FOURTH CIRCUIT'S APPROACH IN ANALYZING THE IMPORTANT FINANCIAL FACTOR WITH RESPECT TO ELEVENTH AMENDMENT IMMUNITY HAS CREATED AND SHARPENED CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER APPROACH TO BE UTILIZED IN EXAMINING THIS FACTOR WHICH MUST BE RESOLVED BY THE SUPREME COURT.

A. GENERAL DISCUSSION OF ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment of the United States Constitution provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." By its terms, the protection of the Eleventh Amendment is available only to "one of the United States." See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-401,

99 S. Ct. 1171, 1177, 59 L. Ed. 2d 401 (1979). While some agencies exercising state power have been permitted to invoke the Amendment to protect the state treasury from liability which would have had the same practical consequences as a judgment against the state, the Court has refused to extend immunity to political subdivisions even though they exercise a "slice of state power." Lake Country, 440 U.S. at 400-401.

In light of the foregoing, a question as to the applicability of immunity often arises in situations where a state is not named in the suit but the defendant entity has some type of relationship to the state or governmental character. A general test has evolved to analyze the immunity question in those situations. The Court must determine whether

the particular entity is the "alter ego" of the state or the state is the real substantial party in interest. See State Highway Comm'n of Wyoming v. Utah Constr. Co., 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262 (1929), Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 65 S. Ct. 347, 89 L. Ed. 389 (1945), and Edelman v. Jordan, 415 U.S. 651, 97 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

B. THE IMPORTANT FINANCIAL FACTOR

According to the Ford Motor Co. case, the critical inquiry in the alter ego/real party in interest analysis is whether the relief sought is relief against the state because "when the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest

and is entitled to invoke its sovereign immunity from suit." Ford Motor Co., 323 U.S. at 464. The central goal of the Eleventh Amendment is to shield state treasuries from federal court judgments. Edelman, 415 U.S. at 663, Jacintoport Corp. v. Greater Baton Rouge Port Comm., 762 F. 2d 435, 440, (5th Cir. 1985), cert. den. 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986) and Fitchik v. New Jersey Transit Rail Operations Inc., 873 F. 2d 655, 659-660 (3rd Cir. 1989), cert. den. 493 U.S. 850, 110 S. Ct. 148, 107 L. Ed. 2d 107 (1989). Although the federal courts examine a number of factors in analyzing a sovereign immunity question, they generally agree that the most important factor is whether the state treasury will be responsible for paying any judgment

which might be awarded.5 The Fourth Circuit has concurred with this position in Ram Ditta, and in the case at hand.

C. CONFLICTING APPROACHES IN ANALYZING THE FINANCIAL FACTOR

While there is general agreement regarding the importance of the financial factor, the Ristows believe the Fourth Circuit's decision has created additional conflict and sharpened existing conflict among the Circuits as to precisely how the important financial factor should be analyzed. Two divergent approaches have evolved for analyzing the financial nexus which must exist between an entity and the state for the finan-

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5 See for example, Edelman, Jacintoport and Feeney, cited earlier; Miller-Davis v. Illinois State Toll Highway Authority, 567 F. 2d 323 (7th Cir. 1977); Blake v. Kline, 612 F. 2d 718 (3rd Cir. 1979), cert. den. 447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1112 (1980).

cial factor to favor sovereign immunity. These can be termed the "broad financial approach" and the "actual financial analysis".

The decision of the Third Circuit in Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, cited earlier, illustrates the broad approach wherein the Court held that the symbiotic relationship between the Authority and the States of New York and New Jersey supported a finding of sovereign immunity. Those States had originally funded the Authority and provided a method for its financial independence. Police Benevolent Association, 819 F. 2d at 415-416. There was also a limited ability for the Authority to receive funds from the States to meet administrative expenses

in the event revenues were insufficient to cover expenses. Police Benevolent Association, 819 F. 2d at 416. However, the Authority could not pledge the credit of either State without its consent, and no provision committed the state treasuries to satisfy judgments. See Feeney, 873 F. 2d at 631.

Because the States had initially created and funded the Authority and had provided a limited appropriation of state funds, the Third Circuit believed the financial factor favored sovereign immunity regardless of whether the state treasuries would actually be responsible for the payment of a particular judgment. Police Benevolent Association, 819 F. 2d at 416. In its decision herein, the Fourth Circuit found the Third Circuit's approach in Police Benevolent

Association persuasive in determining the financial factor favored immunity. (App. A15-17.

The actual financial analysis approach is best seen in the decisions of the Second Circuit in Feeney, and the Fifth Circuit in Jacintoport, cited earlier. In both cases, the Courts examined whether, as a practical matter, the plaintiff's judgment would actually have to be satisfied from the state treasury.

The Jacintoport Court conducted a financial examination and concluded any judgment obtained by the plaintiff could be satisfied by the Commission itself. Jacintoport, 762 F. 2d at 441. Such analysis determined that even the most favorable estimate of the plaintiff's damages would not reach one-tenth of the Commission's surplus revenue in a good

year. Jacintoport, 762 F. 2d at 441. The state's tertiary liability on the Commission's bonds was found to have only an ancillary effect on the treasury. Jacintoport, 762 F. 2d at 441-442. The Court declined to address the situation where the size and nature of a judgment would result in liability for the state. Jacintoport, 762 F. 2d at 441.

In the Feeney case, the Second Circuit considered the sovereign immunity issue with respect the very same Port Authority which the Third Circuit had addressed previously in the Police Benevolent Association case. Unlike the Third Circuit, however, the Second Circuit determined that such entity was not entitled to sovereign immunity. Feeney, 873 F. 2d at 631.

The Feeney Court believed the financial factor favored the denial of immunity since the Authority could not pledge the credit of either state, could only borrow money in its own name, and no provision committed the state treasuries to satisfy any judgments. Feeney, 873 F. 2d at 631. The limited appropriation from the state treasuries requiring gubernatorial approval was felt to be a limited and optional obligation evidencing an intent to insulate the vast bulk of the treasury from the Authority's debts. Feeney, 873 F. 2d at 631.

Relying heavily on the reasoning of Feeney and Jacintoport cases among others, the Ristows argued that the state treasury was insulated from any judgment in their favor because of the potential

size of the judgment, the existence of insurance coverage and the Ports Authority's own separate funds, the presence of a provision insulating the State from Ports Authority indebtedness, and the absence of a continuing funding obligation on the part of the State. The Fourth Circuit admitted the Ristows' argument found support in the reasoning of the Second Circuit in Feeney. (App. A15)

In granting certiorari in Feeney to resolve the conflict between the Second and Third Circuits as to the New York/New Jersey Authority's status, the Supreme Court could have determined which of the two approaches to the financial factor was preferable. The Court, however, chose to affirm the Second Circuit on alternative grounds find-

ing that if the Authority is entitled to sovereign immunity such immunity has been expressly waived. See Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, 306-309, 110 S. Ct. 1868, 19 L. Ed. 2d 264, 273-275 (1990). Thus, the conflict between the two approaches was not resolved. The Fourth Circuit's decision herein has created additional conflict by openly bringing another Circuit in conflict with those Circuits6 employing

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6 Having reviewed the Seventh Circuit's decision in Miller-Davis, cited earlier, and the First Circuit's in Royal Caribbean v. Puerto Rico Ports Authority, 973 F. 2d 8 (1st Cir. 1992), the Ristows are convinced these Circuits also employ the actual financial approach. Interestingly enough, in the subsequent cases of Fitchik, cited earlier and Bolden v. Southeastern Pennsylvania Transp. Auth., 953 F. 2d 807 (3rd Cir. 1991), cert. den. ____ U.S. ____, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992), the Third Circuit itself now seems to have become more financially analytical in its view.

an actual financial analysis approach and by sharpening the existing conflict between the Second and Third Circuits which the Supreme Court attempted to alleviate by deciding the Feeney case on alternative grounds.

D. SUPREME COURT RULE 10 CONSIDERATIONS

Under Supreme Court Rule 10.1 (a), one of the criteria for granting a petition for certiorari is when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. The foregoing discussion has demonstrated the existence of a clear and open conflict between the Circuits as to the approach to be taken in addressing the most important factor in the alter ego equation. Since Eleventh Amendment immunity is an

important question of federal law and the factor involved is the most important factor in the alter ego equation, the conflict presents a substantial question and "special and important reasons" which would justify certiorari. See Supreme Court Rule 10.1 and Rice v. Sioux City Memorial Park Cemetery, Inc. 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 The case involves principles whose settlement is important to the public, and a conflict which is real. Accordingly, pursuant to NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed 479 (1951), certiorari is appropriate and necessary.

Other considerations also favor certiorari. The case does not involve a complex fact situation. No dispute exists as to the facts material to the

sovereign immunity issue, and the case thus presents an ideal vehicle for review. If there is no dispute over the facts, a determination of whether the District Court applied the proper standard in the case is a question of law and an appellate court may exercise independent judgment and enter its own legal conclusions. See United States v. Parke, Davis & Co., 362 U.S. 29, 44, 4 L. Ed. 2d 505, 80 S. Ct. 503, 512 (1960), later app. 365 U.S. 125, 5 L. Ed. 2d 457, 81 S. Ct. 433 (1961) and United States v. Singer Mfg. Co., 374 U.S. 174, 193, 10 L. Ed. 2d 823, 83 S. Ct. 1773, 1783 (1963), and Murphy v. Turner, 426 F. 2d 422, 423 (10th Cir. 1970).

Given the substantial number of cases arising in the Eleventh Amendment

area, the issue raised herein is not episodic but is frequently seen in the federal system. The Fourth Circuit's decision has also created a conflict over the respondent's status with the Southern District of New York in the Doris case. Throughout this litigation, the Ristows have believed Doris was correctly decided and should have been followed. Finally, as will be discussed in Part III, the Ristows' position has substantial merit.

Supreme Court Rule 10.1 (c) provides an additional reason for granting review herein. In light of the conflicting approaches utilized by the Courts of Appeals to analyze the financial factor in sovereign immunity matters, it is clear that this important question of federal law has not been settled by the Supreme

Court. The appellate courts simply do not have any definitive guidance from the Supreme Court as to the proper approach to be taken in analyzing the financial factor.

In his separate opinion in the aforementioned Port Auth. Trans-Hudson v. Feeney case, Justice Brennan alluded to the problem in a footnote when he stated "this Court has not decided which arrangements between a State and a nominal defendant are sufficient to establish that the State is the real party in interest for Eleventh Amendment purposes." Feeney, 495 U.S. at 317-318, 109 L. Ed. 2d at 280. While Justice Brennan, joined by Justices Marshall, Stevens and Blackmun, concurred in the Court's judgment, they did not feel the Authority's consent to suit was neces-

sary because they believed the Authority was not entitled to Eleventh Amendment immunity. Feeney, 495 U.S. at 309-318, 109 L. Ed. 2d at 275-281. The case at hand presents the Court with the perfect opportunity to resolve this question.

In view of the foregoing considerations, the Supreme Court should grant certiorari in this matter. The Ristows will now discuss why the actual financial analysis approach utilized by them is proper in addressing the financial factor. Finally, they will outline the merits of their sovereign immunity position.

II. AN ACTUAL FINANCIAL EXAMINATION OF THE CIRCUMSTANCES OF THE CASE IS THE PROPER APPROACH TO BE UTILIZED IN ASSESSING THE IMPORTANT FINANCIAL FACTOR IN AN ELEVENTH AMENDMENT IMMUNITY ANALYSIS.

As discussed earlier on page 21, the

central goal of the Eleventh Amendment is to shield states' treasuries. Thus, suits by private parties seeking to impose a liability which must be paid from the state treasury are barred by the Eleventh Amendment. Edelman, 415 U.S. at 663. In Jacintoport, the Fifth Circuit noted that "the purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state." Jacintoport 762 F. 2d at 440.

Consistent with such purpose, the actual financial analysis approach examines the actual circumstances, i.e. the size of the possible judgment, the entity's resources, and the funding obligation of the state, to determine whether the plaintiff's judgment would be paid from the state treasury. The broad ap-

proach, however, focuses more on how the entity was created and where its funding originated; it does not take a realistic look at the circumstances then and there existing. Thus, the broad approach favors immunity in situations where there is absolutely no possibility the state treasury would have to pay a judgment as is the case herein. Accordingly, the broad view is not consistent with the real purpose of the Eleventh Amendment and should be rejected by the Court.

As demonstrated by the facts of this case, the broad view also has the undesirable effect of conferring the benefits of sovereign immunity upon an entity, Lloyds of London Insurance Company, which is not the State or even remotely connected with the State in any way. The Amendment, by its very language,

limits immunity to only "one of the United States." Lake Country, 440 U.S. at 400. Thus, municipal corporations or bodies politic similar to cities, townships and counties do not enjoy Eleventh Amendment immunity. See Port of Seattle v. Oregon & W.R. Co., 255 U.S. 56, 71, 65 L. Ed. 500, 41 S. Ct. 237, 242 (1921); Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 280, 50 L. Ed. 2d 471, 97 S. Ct. 568, 572 (1977); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 55 L. Ed. 890, 31 S. Ct. 654, 657 (1911), and Lake Country.

By concentrating on symbiotic relationships, origins, and the like, instead of conducting an actual financial analysis, the broad view extends the scope of sovereign immunity far beyond

its intended boundaries. An actual financial analysis, on the other hand, avoids this problem since the existence of insurance coverage is one component in the overall analysis as to whether the state treasury will have to pay a judgment. Because it is entirely consistent with the scope and purpose of the Eleventh Amendment, the actual financial analysis approach must be preferred to the broad view in analyzing the financial factor in the alter ego equation.

III. WHEN CORRECTLY ANALYZED, THE PORTS AUTHORITY IS CLEARLY NOT ENTITLED TO ELEVENTH AMENDMENT PROTECTION.

A. THE IMPORTANT FINANCIAL FACTOR

Using an actual financial analysis approach, it is clear that any judgment entered in favor of the Ristows would not be paid from the South Carolina

state treasury because of the following facts:

1) the existence of liability insurance coverage through Lloyds of London;

2) the existence of a statutory provision insulating the State from Ports Authority liabilities;

3) the absence of a continued funding obligation on the part of the State for the Authority or a provision compelling it to pay the respondent's judgments.

4) the fact that the Ports Authority has its own separate funds and can raise funds;

Let us now discuss these tiers of protection.

1. INSURANCE COVERAGE

On their personal injury claims, the maximum amount the Ristows could recover is the sum of $430,000.00 plus costs, while they could recover $75,000.00 plus costs on their alternative breach of contract claim.7 Presumably, an entity with activities as extensive as the Ports Authority has ample coverage through Lloyds to cover such a claim. At no point, did the Authority claim there was insufficient coverage. Since a settlement offer of $75,000.00 was previously made, it is reasonable to assume coverage at least equal to such amount existed. The possibility of any liability beyond policy limits appears remote.

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7 These are the amounts of damages prayed for by the Ristows in their complaint. See App. D22-23

Despite the Ristows' extensive arguments as to insurance coverage, the Fourth Circuit essentially ignored this matter and concentrated instead on the symbiotic relationship of the Authority and the State. (App. A13-19) By adopting the so-called broad view, the Fourth Circuit has given Lloyds what amounts to a free ride in this case. Clearly, the Eleventh Amendment did not intend to extend the protection of sovereign immunity to private insurance carriers. If the Court was legitimately concerned about the exposure of the state treasury, the Ristows cannot understand why the Fourth Circuit simply did not deny immunity for judgments at least to the extent of insurance coverage. In the aforementioned Royal Caribbean, Fitchik, and Bolden cases, the ex-

istence of insurance coverage was a key factor in denying immunity. Here the Fourth Circuit inexplicably ignored it.

2. THE INSULATION PROVISION

Assuming for the sake of argument, however, that the Ristows' recovery exceeded policy limits, the other tiers of protection insulate the state treasury from any judgment in favor of the Ristows. First, the language of S.C. Code Ann. Sec. 54-3-140 (9) insulates the state treasury from any liability for Ports Authority indebtness. It provides as follows:

> "[the Authority] may apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebted-

> ness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof." Emphasis added. See App. C10-18 for text of entire statute.

The Fourth Circuit interpreted this provision as being applicable only to federal indebtedness because of its placement and the Court's reference to other statutes. (App. A12-13) Although the insulation provision is contained in a section discussing federal indebtedness, the plain language (i.e. "no indebtedness of any kind") utilized by the General Assembly demonstrates a clear legislative intent to insulate the state treasury from all types of indebtedness

and not merely those of a federal nature. If the legislature desired to impose such a limitation on the provision, it would have selected other language such as "no federal indebtedness of any kind", "no federal indebtedness" or "no indebtedness of that kind".

To support its interpretation, the Court noted the absence of any cross-reference to Sec. 54-3-140 (9) in Sec. 54-3-140 (2) empowering the Authority to mortgage or lease property and in Sec. 54-3-1010 authorizing the Authority to issue bonds. (App. A13) No cross-reference is needed however since the language of Sec. 54-3-140 (2) and Sec. 54-3-1010 clearly indicates the party acting as mortgagor, borrower, or lessor is the Ports Authority alone. Thus, parties doing business with the Author-

ity know they are dealing with the Authority and can seek payment only from it, absent some written guarantee of the liability by someone else. In Doris, the Southern District of New York agreed with the Ristows' interpretation of Sec. 54-3-140 (9). Doris, 406 F. Supp. at 1095-1096. Like the situation in Feeney, the South Carolina state treasury is protected from any judgments by definitive statutory language.

3. THE ABSENCE OF A CONTINUED FUNDING PROVISION

The absence of any provision requiring the State to fund the Authority or pay its judgments furnishes the next tier of protection. In Feeney there was an optional obligation to fund the entity, and the Second Circuit found the state treasuries to be insulated from

authority indebtedness. Feeney, 873 F. 2d at 631. Here, no provision of any kind compels the State to fund the Authority or pay anything on its behalf. In Jacintoport, the State of Louisiana had tertiary liability for the port board's indebtedness, but the Court determined the treasury was protected. Jacintoport, 762 F. 2d at 441-442. Here, no liability of any kind on the part of the State exists. South Carolina's state treasury is even more insulated than its counterparts in New York, New Jersey, and Louisiana.

Should state treasury funds be used to pay a judgment in the Ristows' favor, or meet a budgetary shortfall, such payment would be purely voluntary. The purpose of the Eleventh Amendment, however, is to protect the state treasury

against involuntary liability. See Duckworth v. Franzen, 780 F. 2d 645, 650-651 (7th Cir. 1985) Voluntary payments by the state clearly do not trigger immunity. See Fitchik, 873 F. 2d at 661; Bolden, 953 F. 2d at 819.

4. SEPARATE FUNDS

The existence of the Ports Authority's own assets and its ability to generate funds provides the final prong of protection for the State. The Ports Authority has its own bank accounts and owns property in its own name. See S.C. Code Ann., Sec. 54-3-140 (2) and 54-3-1020 at App. C11, 52-53. The Ports Authority can generate funds in a variety of ways some of which are as follows:

1) licensing fees; S.C. Code Ann., Sec. 54-3-140 (14) at App. C17-18;

2) rent; S.C. Code Ann., Sec. 54-3-140 (2) at App. C11;

3) borrowing; S.C. Code Ann., 54-3-140 (2) and (9) at App. C11, 14-15;

4) funds from the counties of Beaufort, Charleston, and Georgetown; S.C. Code Ann., 54-3-130 (5) at App. C8-9;

5) funds from others; S.C. Code Ann., Sec. 54-3-1030 at App. C53.

The Ports Authority has generated considerable revenue having distributed excess earnings of $1,500,000.00 to the State. (App. A9) Thus, the Ports Authority clearly has its own separate funds and the ability to raise funds out of which any judgment in favor of the Ristows exceeding insurance coverage

could be paid. In Miller-Davis, the existence of a special segregated highway fund held by the state treasurer out of which the plaintiff's judgment would be paid was critical in denying Eleventh Amendment immunity for a state highway authority. Miller-Davis, 567 F. 2d at 327. A provision disclaiming bond liability by the state and the absence of a continued funding requirement were also key factors in the Miller-Davis decision. Miller-Davis, 567 F. 2d at 327 & 328. The entities in Bolden and Royal Caribbean also had their own funds and the ability to raise funds. Bolden, 953 F. 2d at 819 and Royal Caribbean, 973 F. 2d at 10 and 11.

On page 7 of its opinion, the Fourth Circuit claimed that the borrowing power of the Ports Authority is substantially

circumscribed pursuant to Sec. 54-3-1010 relating to the issuance of bonds for particular purposes. (App. A18) However, Sec. 54-3-140 (8) gives the Authority broad power to pay reasonably necessary costs and expenses, and Sec. 54-3-140 (2) allows it to mortgage real and personal property. (App. C11, 14) The Ports Authority has a sufficiently broad power to pay expenses.

The Fourth Circuit afforded considerable weight to the State's initial funding of the Ports Authority, but it admits the Authority is now self-sufficient. (App. A17-18) The Court also attached significance to the ability of the General Assembly to reach excess Ports Authority revenues under Sec. 54-3-1020 and the transfer of funds to the Ports Authority for use in the BMW

transaction. (App. A18-19) Under the actual financial analysis approach, none of these considerations are relevant since an actual financial assessment reveals that the state treasury would not be responsible for the payment of the Ristows judgment.

Aside from the irrelevance aspect, these considerations and the Court's symbiotic relationship approach ignore some very elemental principles of common law. In appropriating funds for the initial funding of the Authority and for projects such as the BMW transaction, the General Assembly authorized a legal separation of treasury funds from the state treasury. Article X, Sec. 8 of the South Carolina Constitution indicates that money may be withdrawn only in pursuance of appropriations made by

law. By enacting Chapter 54 of the South Carolina Code, the Assembly created a legally separate entity which owns real and personal property under Sec. 54-3-140 (2). (App. C11) Sec. 54-3-1020 indicates that funds deposited by the Authority in a bank are "funds of the Authority." (App. C52) Legal title of the assets is definitely with the Ports Authority and not the State.

Aside from marital property or community property considerations, legal title is normally determinative of the ownership of assets. Thus, once the Assembly has made a legal separation of funds from the state treasury, they cease to be a part of the treasury and are the property of the Authority. Legislative approval is also needed to pay any excess revenues to the state treas-

ury under Sec. 54-3-1020. The symbiotic relationship approach utilized by the Fourth Circuit ignores the legal realities surrounding the legal separation of contributions from the state treasury and the ownership of assets by the Ports Authority.

While there is no denying the State's contributions to the Ports Authority and its ability to withdraw excess earnings, one must remember the criteria in question is not whether the State has contributed or has access to Authority funds but whether a judgment will have to be paid from the State treasury. In Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), the state had made significant financial contributions to a school

board but the Court denied sovereign immunity. In Miller-Davis, the state had the right to receive any surplus funds upon dissolution of the toll authority, but the Seventh Circuit denied immunity for reasons discussed earlier. See Miller-Davis, 567 F. 2d at 327-328.

In the case at hand, the Ristows have shown the existence of the Ports Authority's own legally separate funds and the ability to raise funds. This final tier of protection, coupled with the other three prongs, guarantees that no judgment in their favor would have to be paid from the state treasury. The important financial factor weighs heavily against immunity for the Authority.

B. AUTONOMY

In addressing the second of the Ram Ditta factors, i.e. whether the entity

exercises a significant degree of autonomy from the state, the Fourth Circuit believed the considerations were mixed. (App. A23) On the one hand, the Ports Authority has considerable autonomous powers such as the power to sue and be sued, to make contracts, to pay its costs and expenses, to hire and fire employees at will, to rent and purchase property, etc. (App. A20-22) The Court admitted the Ports Authority has considerable control over its day-to-day operations. (App. A22-23)

On the other hand, the Fourth Circuit noted the absence of a formal corporate charter, the appointment of the board of directors by the governor with confirmation by the senate, the Ports Authority's immunity from taxes and the inclusion of its employees in the state

retirement system and the state worker's compensation plan. (App. A21-23) The Court believed the Ports Authority was beholden to the State. (App. 23) Ultimately, the balance of the factors led the Court to conclude the Ports Authority answers to the State and is not autonomous for Eleventh Amendment purposes. (App. A23)

In reviewing the Fourth Circuit's reasoning, one can see it is confusing autonomy with accountability. Certainly, the Ports Authority is responsible to the State just as the officers and directors of ordinary business corporations are to their shareholders. Such accountability does not negate the autonomy of the Ports Authority as demonstrated by the independent powers possessed by it.

In the aforementioned Jacintoport case, the Fifth Circuit was presented with a similar situation where the Baton Rouge port board commissioners served at the pleasure of the governor. Jacintoport, 762 F. 2d at 442. The Fifth Circuit, however, was concerned with analyzing the port board's independent management authority rather than the independence of the individual commissioners. Jacintoport, 762 F. 2d at 442. In Jacintoport, the Court found the commission had great latitude to manage itself without additional approval. Jacintoport, 762 F. 2d at 442. When the autonomy factor is considered under the approach utilized in Jacintoport witn the autonomy/accountability distinction in mind, this factor strongly favors a finding of no sovereign immunity in this

case.

C. STATE VERSUS LOCAL CONCERNS

As to the third factor, i.e. whether the Authority is involved primarily with state or local concerns, the Fourth Circuit had little trouble concluding the Ports Authority's functions extend beyond the coast to affect all regions of the State. (App. 24) The Ristows respectfully disagree.

A review of the applicable statutory provisions shows a limited scope of jurisdiction. Sec. 54-3-110 allows the Authority to develop and operate seaports within the State, namely Charleston, Georgetown and Port Royal. (App. C5-6) The Ports Authority's jurisdiction covers the waters and shores of the State's seaports, over streams flowing into such seaports and extends to the

outer edge of the outer bar at such seaports. See Sec. 54-3-120 at App. C6. Under Sec. 54-3-130, the Ports Authority's purposes are limited to the coastal areas of South Carolina. (App. C6-10)

D. TREATMENT AS A MATTER OF STATE LAW

As to the Ports Authority's treatment as a matter of state law which is the final prong of the Ram Ditta test, the Fourth Circuit determined the state's view of the Authority's status is at best inconclusive. (App. 25-26) The Ristows agree with that conclusion.

E. OTHER FACTORS

In making its decision, the Fourth Circuit was also influenced by two other factors. First, the federal district courts in South Carolina held that the Ports Authority is entitled to Eleventh Amendment immunity in the cases of Sea

board Air Line and Coakley cited earlier. (App. 26) As the Ristows discussed in their briefs, the Southern District of New York in Doris pointed out the deficiencies of the 1954 Seaboard Air Line decision. Doris rejected the Seaboard Air Line decision because the latter was based upon the governmental nature of the Authority's activities and did not examine the relationship between the Ports Authority and the State. Doris, 406 F. Supp. at 1095. An alter ego analysis was felt to be necessary by the Southern District of New York because "if the Authority is not an 'alter ego' of the state, the fact that it is performing governmental functions has no bearing upon the question of whether it

is cloaked by the Eleventh Amendment,8 for 'the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work'."9 Doris, 406 F. Supp. at 1095.

The second factor which influenced the Court's decision was the existence of a state court forum for the Ristows' claims against the Ports Authority. (App. 26-27) However, the existence or non-existence of a state court forum

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8 Cases cited by Doris on this point: Bowen v. Hackett, 387 F. Supp. 1212, 1220 (D.R.I. 1975); Gordenstein v. University of Delaware, 381 F. Supp. 718, 723 (D. Del. 1974); Raymond Int'l v. M/T Dalzelleagle, 336 F. Supp. 679, 682 (S.D.N.Y. 1971); Lowes v. Pennsylvania Turnpike Comm'n, 125 F. Supp. 681 (M.D. Pa. 1954)

9 Case cited by Doris on this point: Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388, 83 L. Ed. 784, 59 S. Ct. 516 (1939)

simply is not a relevant factor in the alter ego/real party in interest analysis. Neither of these other factors cited by the Court supports a finding of sovereign immunity for the Ports Authority.

F. SUMMARY

When the important financial factor is properly analyzed using the actual financial analysis approach, such factor weighs heavily in favor of denying Eleventh Amendment immunity for the Ports Authority. The independent management authority of the respondent likewise tips the autonomy factor in favor of the denial of immunity. Finally, the Authority's statutory jurisdiction shows its concerns to be primarily local. The merits of the Ristows' arguments against sovereign immunity are substantial and

mandate reversal of the Fourth Circuit if certiorari is granted.

CONCLUSION OF PETITION

In this petition, the Ristows have demonstrated the existence of important considerations which necessitate the granting of certiorari in this case. They have also shown their sovereign immunity position to be correct. For the reasons recited in this petition, the Ristows' petition for certiorari should be granted and it is respectfully requested that the Court grant the same.

Respectfully submitted

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Dated: August 30, 1994

94 428 SEP - 7 1994

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FRED W. RISTOW; SUSAN M. RISTOW,

Plaintiffs-Appellants,

V. No. 93-1861

SOUTH CAROLINA PORTS AUTHORITY, an agency of the State of South Carolina; THE SS UNKNOWN, an unknown ocean going ship,

Defendants-Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert S. Carr, Magistrate Judge. (CA-91-3677-2-2J)

Argued: March 9, 1994

Decided: June 13, 1994

Before WILKINS, Circuit Judge, and SPROUSE and CHAPMAN, Senior Circuit Judges.

Affirmed by published opinion. Senior Judge Sprouse wrote the opinion, in which Judge Wilkins and Senior Judge Chapman joined.

COUNSEL

ARGUED: Leonard William Schulz, Big Bend, Wisconsin, for Appellants. William H. Vaughan, Jr., VAUGHAN & LAWRENCE, P.A., Charleston, South Carolina, for Appellee.

OPINION

SPROUSE, Senior Circuit Judge:

Fred W. Ristow is a long-haul truck driver. On December 20, 1988, he drove a load of steel pipes to the South Carolina State Ports Authority ("Ports Authority") terminal in Charleston, South Carolina. While Ristow was standing atop a bundle of pipes on his truck, a forklift operator employed by the Ports Authority began to lift the truck's cargo. Ristow was forced to jump from the truck and suffered serious injuries. The Ports Authority notified

its insurance carrier, Lloyds of London, of the incident. The Ports Authority and Lloyds retained Carter & Co., a local insurance adjustment firm, to represent their interests. Ristow claims that an employee of Carter & Co. offered him and his wife a $75,000 settlement which they accepted, but Carter & Co. refuses to pay the $75,000.

In December 1990, Ristow and his wife brought suit in federal district court in South Carolina against the Ports Authority,1 asserting federal ju

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1 The Ristows also named the vessel the SS Unknown as a defendant in the complaint. The actual name and registry of this ship, onto which Ristow's cargo was to be loaded, were never identified, and the ship was never served notice of the suit. Accordingly, the SS Unknown was dismissed as a defendant.

risdiction based on diversity of citizenship and admiralty. The Ristows claimed negligence, Fred demanding compensation for his injuries and his wife alleging loss of consortium. They also sued for breach of contract in connection with the $75,000 settlement offer. With the parties' consent, this case was referred to a United States Magistrate pursuant to 28 U.S.C.A. Sec. 636(c) (1993). After briefing and a hearing, the magistrate granted the Ports Authority's motion to dismiss the case on the ground that the Ports Authority was immune from suit under the Eleventh Amendment. The Ristows appeal.

I

The Eleventh Amendment to the United States Constitution provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The plain language of the amendment only provides immunity for suits against "one of the United States." Nearly fifty years ago, however, the Supreme Court stated, "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." Ford Motor Co. v. Department of Treasury, 332 U.S. 459, 464 (1945). The Supreme Court has subsequently made clear that a suit

against an entity that is an arm of the state may also be barred by the Eleventh Amendment. See e.g., Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

In this case, the Ports Authority maintains that it is a state entity-more particularly, that it is the alter ego of the State of South Carolina. It claims Eleventh Amendment immunity from suit. In Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n, 822 F.2d 456, 457-58 (4th Cir. 1987), we set forth the following four-part, non-exclusive inquiry for determining when an entity is the alter ego of a state for Eleventh Amendment purposes: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exer-

cises a significant degree of autonomy from the state; (3) whether it is involved with local versus statewide concerns; and (4) how the entity is treated as a matter of state law. The existence of Eleventh Amendment immunity is a question of law, and the facts to be considered in applying the Ram Ditta factors to the Ports Authority are undisputed. See United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). We, therefore, consider this immunity issue de novo.

A

The first Ram Ditta factor, the responsibility of the state treasury for the judgment, is generally the most important. This notion stems from the Supreme Court's statement in Ford Motor Co. that the state is the real party in

interest "when the action is in essence one for the recovery of money from the state." Ford Motor Co., 323 U.S. at 464. Here, to determine whether a tort recovery from the Ports Authority would in essence be one from the state, it is important to understand the role of the state treasury in the formation and operation of the Ports Authority. The Ports Authority was created by the State of South Carolina in 1942, and the state's General Assembly appropriated $750,000 in initial capital expenditures and maintenance costs. Annual appropriations of funds continued through 1959. While the Ports Authority no longer receives direct funding for its daily operations from the state, the General Assembly continues to make annual appropriations to pay the principal and in-

terest on the $132,000,000 in general obligation bonds issued over the years to finance capital improvements for the Ports Authority. It is clear that the Ports Authority owes its very existence and current financial position to the state's coffers.

The close relationship has extended beyond the initial formation of the Ports Authority. Under South Carolina law, "[a]ny and all net revenues or earnings not necessary or desirable for operation of [the Ports Authority's] business shall be subject to the further action of the General Assembly." S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977). Under this authority, the State of South Carolina has withdrawn over $1.5 million in funds from the Ports Authority to the state treasury since

1942. In 1992, the State entered into an agreement with BMW under which the German automaker would construct a manufacturing plant in Spartanburg County. To purchase the land and prepare the site for BMW's use, the state transferred over 40 million from its treasury to the Ports Authority so that the Ports Authority could acquire the land on behalf of the state. The state's withdrawal of excess Ports Authority funds and its commingling of state funds with those of the Ports Authority in transactions like the BMW transaction are a strong indication that the funds of the Ports Authority belong to the state and that a tort recovery out of those funds would constitute one from the state treasury.

Without denying these facts, the Ris-

tows contend nonetheless that numerous other factors support a finding that a recovery in this case would not be paid out of the state treasury. In particular, the appellants rely on Sec. 54-3-140(9) of the South Carolina Code which provides:

> In order to enable it to carry out the purposes of this chapter, the Authority . . . [m]ay apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidence of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall be secured by the faith, credit or taxing power of the State, or any political subdivision thereof[.]

S.C. Code Ann. Sec. 54-3-140(9) (Law.

Co-op. 1977) (emphasis added). The Ristows assert that the phrase "no indebtedness of any kind" means precisely what it says: the State of South Carolina may not be held responsible for any debt, including money owed by the Ports Authority due to a tort recovery against it. Such an interpretation would insulate the state treasury from any payment of a recovery in favor of the Ristows in this case. We are unpersuaded.

The Ristows' view of 54-3-140(9) cannot be squared with the language and structure of the other parts of the South Carolina Code relating to the fiscal prerogatives and responsibilities of the Ports Authority. Subsection (9) solely concerns the power of the Ports Authority to borrow money from agencies of the United States government. Other

statutory provisions enable the Ports Authority to incur debt generally but contain no debt insulation provisions. For example, Sec. 54-3-140(2)2 empowers the Ports Authority to mortgage or lease real and personal property but does not insulate the state from any indebtedness arising from such mortgages or leases, nor does it refer to Sec. 54-3-140(9). Similarly, Sec. 54-3-1010 3 enables the Ports Authority to issue bonds to finance its operations. No language in Sec. 54-3-1010 shields the state from responsibility for funds owed under such debt financing, nor is there any cross-reference to Sec. 54-3-140(9).

The Ristows also make an "insurance"

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2 S.C. Code Ann. Sec. 54-3-140(2) (Law. Co-op. 1977).
3 S.C. Code Ann. Sec. 54-3-1010 (Law. Co-op. 1977).

argument in asserting that the first Ram Ditta factor compels a finding in their favor. They claim that the Ports Authority is covered by a Lloyds of London policy that is large enough to satisfy the $430,000 in damages and costs which they seek. Further, they argue, even should the policy not cover the entire tort judgment, any excess liability would be paid by the Ports Authority, not the state treasury. The Ristows point out that the South Carolina Code does not obligate the General Assembly to appropriate funds for the operation of the Ports Authority nor does it make the state explicitly responsible for judgments against the Ports Authority. The only clear source of money out of which a judgment would be paid is the revenue retained by the Ports Authority

in its bank accounts, see S.C. Code Ann. Sec. 54-3-1020 (Law. Co-op. 1977), or funds bon-owed by the Ports Authority under the authority of Sec. 54-3-1010. This reasoning finds support in the Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628, 631-32 (2d Cir. 1989) (absent statutory provisions committing the treasuries of New York or New Jersey to satisfy judgments against the Authority, a judgment could not lead to a depletion of state treasuries), aff'd on other grounds, 495 U.S. 299 (1990) (assuming arguendo that Port Authority is a common agency of New York and New Jersey, it has waived its Eleventh Amendment immunity).

We find persuasive, however, the reasoning of the Third Circuit which, in

considering the identical New York/New Jersey Port Authority, held that the symbiotic relationship between the states and the Port Authority Trans-Hudson Corporation supported a finding of Eleventh Amendment immunity. Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey, 819 F.2d 413 (3d Cir.), cert. denied, 484 U.S. 953 (1987). The Third Circuit found that restrictions on the use of excess revenues to purposes within the Port Authority's statutory mandate were consistent with its holding that the Authority was to be considered an arm of the states of New York and New Jersey. Id. The court also noted, "[T]he states provided the Authority with financial support initially, and then devised a system whereby it could become finan-

cially independent. Appellant sets much store by the financial autonomy of the Authority, arguing that the Authority [therefore] is not a state agency. The appellant is mistaken." Id. at 416. To the contrary, New York's and New Jersey's creation of the Authority's financial structure supported a finding that it shares the states' immunity from suit Id.

We favor this broader and, we think, more practical approach of the Third Circuit over that of the Second Circuit in Feeney, and conclude that the first factor of the Ram Ditta test strongly supports recognition of Eleventh Amendment immunity. Although the South Carolina State Ports Authority now appears to be self-sufficient, it was created through the use of state funds and re-

received annual appropriations from the General Assembly throughout the early years of its existence. Its control over its revenues and borrowing power are substantially circumscribed. True, Sec. 54-3-1020 empowers the Authority to establish bank accounts in which to deposit its funds, but that same section provides that the state is entitled to "any and all net revenues not necessary or desirable for the operation of the business .... " Section 54-3-1010 gives the Ports Authority the ability to issue bonds; however, such borrowing is to be used only for "the acquisition, construction, equipment, maintenance and operation of any facility, building, structure, terminal railroad or any other thing which the Authority is herein authorized to acquire, construct, equip,

maintain or operate ...." Finally, as shown by the BMW transaction, the state has used the treasury of the Ports Authority as a conduit to accomplish the aims of the government of South Carolina.

B

The second inquiry required by Ram Ditta is whether the entity "exercises a significant degree of autonomy from the state." Id., 822 F.2d at 457-58. In Ram Ditta, the court found that the Parks Commission enjoyed considerable autonomy because it was a "body corporate," could sue and be sued in its corporate capacity, could enter into contracts and leases, was managed by a ten-member commission whose members were appointed by county governments, was represented in the proceedings by county attorneys as

opposed to the Maryland Attorney General's office, and derived its operating revenues from county sources. Id. at 458-59.

The Ristows assert that the existence of many of these same factors in this case requires a finding that the Ports Authority is autonomous from the State of South Carolina. It possesses the powers of a body corporate, including the power to sue and be sued and to make contracts. S.C. Code Ann. Sec. 54-3-140(1) (Law. Co-op. 1977). It can purchase and rent real and personal property and may pay all costs and expenses incident to its formation and organization. S.C. Code Ann. Sec. 54-3-140(2), -140(8) (Law. Co-op. 1977). Rather than participate in South Carolina's civil service system, the Ports Authority may

"appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation" of those employees. S.C. Code Ann. Sec. 54-3-140(5) (Law. Co-op. 1977). The Ports Authority is represented in this case by a private law firm, not South Carolina's Attorney General's office.

The Ports Authority responds, however, that it was created as an instrumentality of the State of South Carolina, S.C. Code Ann. Sec. 54-3-130 (Law. Co-op. 1977), and is governed by a seven-member board, "appointed by the Governor, with the advice and consent of the Senate . . . ." S.C. Code Ann. Sec. 54-3-10, -20 (Law. Co-op. 1977). Although it has the powers of a body corporate, the Ports Authority is unlike a traditi-

onal corporation. It has no corporate charter or shareholders, and its board of directors is appointed by public officials. Property of the Ports Authority is not subject to any state taxes or assessments. S.C. Code Ann. Sec. 54-3-1050 (Law. Co-op. 1977). Its employees are eligible for the state's employee retirement system and are subject to the state's workers' compensation plan. The Ports Authority also points out that although its general counsel's law firm was retained by its insurer to represent it in this dispute, there is an assistant State Attorney General assigned to the Ports Authority.

The power to enter into contracts, purchase property, and make unconstrained personnel decisions undoubtedly provides the Ports Authority with con-

siderable control over its day-to-day operations. Such independence, however, does not mean that the Ports Authority is not ultimately beholden to the State of South Carolina. The Ports Authority's board of directors is appointed by the governor with confirmation by the Senate; state law provides it with immunity from property taxes; it was created to serve public ends by the state's General Assembly; and the state enjoys the power to withdraw excess Ports Authority funds for its own use. Although the considerations are certainly mixed, the balance of these factors leads to the conclusion that the Ports Authority ultimately answers to the state and is not, for Eleventh Amendment purposes, an autonomous institution.

C

Likewise, the third Ram Ditta factor supports a finding of Eleventh Amendment immunity from suit. Contrary to the Ristows' position, we have little trouble in concluding that the Ports Authority's functions extend beyond the localized area of the coast to affect all regions of the state. Pursuant to authority granted it under Sec. 54-3-110,4 the Ports Authority provides facilities to enable overland transportation of products to and from South Carolina's ports. It has such facilities in Charleston, Georgetown, Beaufort, and Spartanburg counties. The BMW transaction in Spartanburg County is additional evidence that the Ports Authority's impact can be felt in portions of the

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4 S.C. Code Ann. Sec. 54-3-110 (Law. Co-op. 1977).

state away from the Atlantic Coast.

D

As to the final prong of the Ram Ditta test, there appears to be no clear statement of South Carolina law on this issue. It is true that the Supreme Court of South Carolina in South Carolina Farm Bureau Marketing Ass'n v. South Carolina State Ports Authority, 293 S.E.2d 854 (1982), broadly treated the actions of the Ports Authority as those of the state; however, that court's unstated assumptions cannot be accepted as a definitive statement of whether South Carolina courts view the Ports Authority as the alter ego of the state. On the other hand, the Ristows are unable to point to any state case that would show that the Ports Authority is not to be considered an arm of the state. The

state's view of the status of the Ports Authority is at best inconclusive.

E

Two additional factors influence our decision. First, the federal district courts located in South Carolina have unanimously held that the Ports Authority is entitled to Eleventh Amendment immunity. See, Coakley, No. 2:87-1442-2 (D.S.C. July 18, 1988); South Carolina State Ports Authority v. Seaboard Air Line R. Co., 124 F. Supp. 533 (E.D.S.C. 1954). Second, although the Eleventh Amendment insulates the Ports Authority from suit in federal court, under the South Carolina Tort Claim Act, an agency of the state is liable in tort in the same manner and to the same extent as a private individual under like circumstances, S.C. Code Ann. Sec. 15-78-40

(Law. Co-op. Supp. 1993), and Sec. 15-78-30 5 defines "agency" to include any "authority" of the state. Thus, while retaining Eleventh Amendment immunity, South Carolina has provided a forum in its state courts for claims such as the Ristows'.

We conclude that the South Carolina State Ports Authority is the alter ego of the State of South Carolina and is therefore entitled to Eleventh Amendment immunity from suit.6

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5 S.C. Code Ann. Sec. 15-78-30 (Law. Co-op. Supp. 1993).

6 We therefore need not address the Ristows' argument that the district court had jurisdiction over this case based on diversity of citizenship. "Since neither a state nor its alter ego is a citizen for purposes of diversity jurisdiction, a suit between a state, or its alter ego, and a citizen of another state is not a suit between citizens of different states and diversity jurisdiction does not exist" Harris v. Pennsylvania Turnpike Comm'n. 410 F.2d 1333-34 n.1 (3d Cir. 1969).

II

Alternatively, the Ristows ask us to remand their case to the district court for a determination of whether they have alleged claims founded on admiralty law and whether the Ports Authority has waived its sovereign immunity by entering into this federally regulated area. In Parden v. Terminal R. of Alabama State Docks Dept., 377 U.S. 184, 190 (1964), overruled by, Welch v. Texas Dept. of Highways & Public Transp., 483 U.S. 468 (1987), the Supreme Court would seem to have allowed an action against a state or the alter ego of a state based on the state's adoption and ratification of the Commerce Clause. In Welch, however, the Supreme Court held that "to the extent that Parden v. Terminal Railway is inconsistent with the requirement

that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled." Welch, 483 U.S. at 478. In footnote 8 of Welch, the Supreme Court went on to state that it had "no occasion to discuss the validity of the additional holding in Parden, that Congress has the power to abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that States are engaged in interstate commerce." Id. at 478 n.8 (emphasis added).

The Ristows assert that Congress does indeed possess the power to abrogate Eleventh Amendment immunity and has done so in the context of admiralty law. The Supreme Court in Welch, however, explicitly stated that "the Court has held

that the Eleventh Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity."' Id. at 472-73. The Court went on to note: "In Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982), eight Members of the Court agreed that the Eleventh Amendment bars suit in admiralty brought to recover damages from the State or its officials." Id. at 473 n.3 (citations omitted). Accordingly, we conclude that a suit for money damages by the Ristows against the Ports Authority grounded in admiralty is likewise barred by the Eleventh Amendment.

III

The decision of the magistrate judge is therefore affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,

Plaintiffs,

Civil Action No. 2:91-3677-2J

-versus-

O R D E R

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,

Defendants.

This personal injury case and controversy is before the undersigned United States Magistrate Judge on consent of the parties to conduct all further proceedings and order the entry of final judgment. 28 U.S.C. Sec. 636(c).

On December 10, 1991, the plaintiffs, proceeding pro se,1 filed this action

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1 The plaintiffs subsequently retained counsel in Wisconsin, their home state, as well as local counsel.

seeking damages for personal injuries sustained by Fred Ristow while he assisted in the unloading of a cargo of steel pipe at the docks operated by defendant South Carolina State Ports Authority (SPA) and for the resulting loss of consortium by his wife, Susan M. Ristow. The plaintiffs assert jurisdiction exists in this court by virtue of diversity of citizenship and admiralty. 28 U.S.C. Secs. 1332, 1333.

On February 3, 1992, the defendant SPA moved to dismiss the action on the ground that the court lacks jurisdiction over the subject matter because SPA is an agency of the State of South Carolina and the action against SPA is in reality an action against the State of South Carolina by a citizen of another state precluded by virtue of the eleventh

amendment to the Constitution of the United States.2

A hearing was convened in Charleston, South Carolina, on July 30, 1992. The parties thoroughly briefed the issues and submitted affidavits in support of their positions. The plaintiff argued that the SPA is not the alter ego or agency of the state and, consequently, is not entitled to eleventh amendment protection, and the defendant took the contrary position.

A review of the record and relevant case law indicates that the defendant's motion is meritorious and this suit is barred by eleventh amendment to the

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2 SPA also asserts that it is not a citizen for purposes of diversity jurisdiction. The court need not reach that argument in light of the merits of the eleventh amendment immunity argument.

United States Constitution.3

The SPA is a state agency of South Carolina, created by an Act of the General Assembly now codified at S.C. Code Ann., Sec. 54-3-10 et. seq. (Law. Co-op. 1976). Accordingly, it has been found to be entitled to raise eleventh amendment immunity and is not a "citizen" subject to diversity jurisdiction. See, South Carolina State Ports Authority v. Seaboard Airline R.R. Co., 124 F.Supp. 533 (D.S.C. 1954); Coakley v. South Carolina State Ports Authority, D.S.C. Case No. 2:87-1442-2 (UP 1988).

The Ristows' complaint states a claim

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3 Amendment 11 - Suits against States
The judicial power of the United States shall not construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

of negligence against the SPA. Tort actions against the State of South Carolina are actionable under the South Carolina Tort Claims Act, S.C. Code Ann., Sec. 15-78-10, et. seq. (Law. Co-op. 1986), in a court of the State of South Carolina. This Act expressly includes state agencies such as SPA and makes clear that the General Assembly intended to exercise immunity from liability in suit except as waived by the Act. S.C. Code Ann., Secs. 15-78-40, 15-78-20(b) (Law. Co-op. 1986).

The defendant, South Carolina State Ports Authority, is entitled to the immunity from suit afforded by the eleventh amendment and jurisdiction over it does not lie in this court. Therefore, its motion to dismiss is granted. Further, as the plaintiffs have not served

the other defendant, the SS Unknown an unknown ocean going ship, within one hundred and twenty (120) days after the complaint was filed, this defendant will be dismissed from the action pursuant to Rule 4(j) of the Federal Rules of civil Procedure, thus ending the entire action.

IT IS SO ORDERED.

/s/ Robert S. Carr
ROBERT S. CARR
UNITED STATES MAGISTRATE JUDGE

Charleston, South Carolina

September 2, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and SUSAN M. RISTOW, his wife,

Plaintiffs,

-vs-

ORDER
Civil Action No.
2:91-3677-2J

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and the SS Unknown, an unknown ocean going ship,

Defendants.

This court issued an Order dated September 2, 1992. By error, the notice appropriate for matters subject to review by a district judge was attached to the Order, and a Notice of Filing appropriate for matters subject to such review was mailed to counsel of record. The Plaintiff filed a document entitled "Plaintiff's Objections to Report, Rec-

ommendations and Order of Magistrate" in accordance with such notices.

This court scheduled a hearing. The defendant South Carolina State Ports Authority offered a factual affidavit. The Plaintiffs advised the court that they intended to appeal. In order to prevent injustice, the court will now treat the "Plaintiff's Objections to Report, Recommendations and Order of Magistrate" as a motion to alter judgment under Rule 59 (e) of the Federal Rules of Civil Procedure and deny such motion. Plaintiffs are advised that this Order is final and is dispositive unless appeal to the Unied States Fourth Circuit Court of Appeals is effected within thirty (30) days after this Order.

The "Plaintiff's Objections to Report, Recomendations and Order of Magistrate,"

treated as a motion to alter judgment under FRCP 59 (e), is denied based upon the same reasons as stated in the September 2, 1992 order.

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

June 10, 1993
Charleston, South Carolina

AMENDMENT [XI.]

Suits against states

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

CHAPTER 3

(Note: Histories and citations omitted)

South Carolina State Ports Authority

	Beginning Section
ARTICLE 1. Creation and Organization.....	54-3-10
ARTICLE 3. Purposes and Powers Generally.....	54-3-110
ARTICLE 5. Supervision of Wharves, Warehouses and Other Facilities.....	54-3-410
ARTICLE 7. Erection, Repairs and Removal of Wharves, Docks and Other Structures.....	54-3-610
ARTICLE 9. Particular Powers as to Harbor and Bay of Charleston....	54-3-810
ARTICLE 11. Financial Matters.	54-3-1010

ARTICLE I

CREATION AND ORGANIZATION

SEC.

54-3-10. Creation and membership of State Ports Authority.

54-3-20. Appointment and terms of members; vacancies.

54-3-30. Organization; officers; meetings.
54-3-40. Treasurer.

Sec. 54-3-10. Creation and membership of State Ports Authority.

The South Carolina State Ports Authority is hereby created consisting of a governing body of nine members, hereafter referred to as the Authroty.

Sec. 54-3-20. Appointment and terms of members; vacancies.

The members of the board shall be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years each and until their successors shall have been appointed and have qualified. In the event of a vacancy, however caused, a successor shall be appointed in the manner of original appointment for the unexpired term.

Sec. 54-3-30. Organization; officers; meetings.

They shall elect one of their number

as chairman and one as vice-chairman and shall also elect a secretary. The board shall meet upon the call of its chairman and a majority of its members shall constitute a quorum for the transaction of its business.

54-3-40. Treasurer.

The Authority shall select one of its members to serve as its treasurer. The Authority shall require a surety bond of such appointee in such amount as the Authority may fix and the premium thereon shall be paid by the Authority as a necessary expense of the Authority.

ARTICLE 3

PURPOSES AND POWERS GENERALLY

SEC.

54-3-110. State may improve harbors and seaports through Authority.
54-3-120. Jurisdiction of Authority.
54-3-130. Purposes of Authority.
54-3-140. Powers of Authority.
54-3-150. Acquisition of property.

54-3-160. Powers with respect to certain property.
54-3-170. Use of certain State Property.
54-3-180. Exchange of property; removal of structures.
54-3-190. Lease or grant of property to United States; reimbursing United States for certain acquisition costs.
54-3-200. Acquisition and operation of terminal railroads.
54-3-210. Contracts with railroad employees,
54-3-220. Connecting with or crossing other railroads.
54-3-230. Foreign-trade zones.
54-3-240. Inland ports.
54-3-245. Seafood industrial port in Beaufort County.
54-3-250. Inspection of motor vehicles prior to exportation.

Sec. 54-3-110. State may improve harbors and seaports through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, main-

tenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

Sec. 54-3-120. Jurisdiction of Authority.

The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flow and shall extend to the edge of the outer bar at such harbors or seaports.

54-3-130. Purposes of Authority.

The Authority is created as an in-

strumentality of the State for the accomplishment of the following general purposes, all or any of them, which are intended to broaden and not to restrict any other powers given to it in this chapter, namely:

(1) To develop and improve the harbors or seaports of Charleston, Georgetown and Port Royal for the handling of water-borne commerce from and to any part of the State and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve such harbors or seaports and their port facilities;

(3) To foster and stimulate the shipment of freight and commerce through such ports, whether

originating within or without the State, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America, and any agency or any department, corporation or instrumentality thereof in the maintenance, development, improvement and use of such harbors and seaports in connection with and in furtherance of the war operations and needs of the United States;

(5) To accept funds from any of the counties of Beaufort, Charleston or Georgetown, and to use them in such manner, within the pur-

poses of the Authority, as shall be stipulated by the county and to act as agent or instrumentality for any of such counties in any matter coming within the general purposes of the Authority;

(6) To act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(7) To cooperate and act as co-assurer with the city of Augusta, Georgia, and the Georgia State Ports Authority in furtherance of the river development project known as the Savannah River

Project Below Augusta;

(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the Authority in reference to the harbors and seaports of Charleston, Georgetown and Port Royal; and

(9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.

Sec. 54-3-140. Powers of Authority.

In order to enable it to carry out the purposes of this chapter, the Authority:

(1) Shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient;

(2) May rent, lease, buy, own, acquire, mortgage and dispose of such property, real or personal, as the Authority may deem proper to carry out the purposes and provisions of this chapter, all or any of them;

(3) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigera-

tion storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto and the construction of belt line roads and highways and bridges and causeways thereon and other bridges and causeways necessary or useful in connection therewith and shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof, including terminal railroads;

(4) May acquire, construct, maintain, operate and contract to operate in any of said counties

airports, seaplane bases, naval bases and any other facilities necessary or useful in carrying out the purposes of this chapter and of the Authority;

(5) Shall appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof;

(6) Shall establish an office for the transaction of its business in the city of Charleston and such other offices within and without the State as may be deemed by the board to be necessary or useful in carrying out the purposes of this chapter;

(7) May create and operate such

agencies and departments as the board may deem necessary or useful for the furtherance of any of the purposes of this chapter;

(8) May pay all necessary costs and expenses involved in and incident to the formation and organization of the Authority and incident to the administration and operation thereof and all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this chapter;

(9) May apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the

directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof;

(10) May act as agent for the United States of America or any agency, department, corporation or instrumentality thereof, in any

matter coming within the purposes or powers of the Authority;

(11) May adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the powers granted to it may be enjoyed and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) May do any and all other acts and things in this chapter authorized or required to be done, whether or not included in the general powers in this section

mentioned;

(13) May do any and all things necessary to accomplish the purposes of this chapter; and

(14) May promulgate rules and regulations governing the use of or doing business on the Authority's property or facilities, including the adoption of safety standards and insurance coverage or proof of financial responsibility, and may provide for the licensing of persons, firms or corporations using or doing business on such property or facilities, and for license fees to cover the expense thereof. Licenses may be revoked after notice and hearing by the Authority for wilful breach of or fail-

ure to comply with such rules and regulations.

But the Authority shall not engage in shipbuilding except upon the unanimous vote of its members.

Sec. 54-3-150. Acquisition of property.

For the acquiring of rights-of-way and property necessary for the construction of terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses, and other riparian and littoral terminals and structures and approaches to them and transportation facilities needful for their convenient use and belt line roads and highways, causeways, and bridges and other bridges and causeways, and for the acquiring of

property necessary for the river development project known as the Savannah River Project Below Augusta, and for the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, the Authority may purchase them by negotiation or may condemn them. The power of eminent domain shall apply not only to all property of private persons or corporations but also as to property already devoted to public use.

Sec. 54-3-160. Powers with respect to certain property.

The Authority may exercise in reference to any property, assets, holdings, leases, contracts, rights, franchises or licenses conveyed to it under Section 1 of Act No. 216 of 1945 (Acts 1945, p 365) all of the rights, privileges, pow-

ers, immunities, duties and functions conferred by Secs. 54-5-10, 54-5-60, 54-5-80, 54-5-90 and Secs. 5-35-10 to 5-35-40 upon cities of this State having a population of fifty thousand inhabitants or more and upon port utilities commissions of such cities.

Sec. 54-3-170. Use of certain State property.

The Authority may take, exclusively occupy, use and possess, in so far as may be necessary for carrying out the provisions of this chapter, any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the ripar-

ian rights thereto pertaining. When so taken and occupied, due notice of such taking and occupancy having been filed with the Secretary of State, such areas of land are hereby granted to and shall be the property of the Authority. For the purposes of this section, the meaning of the term "use" shall include the removal of material from and the placing of material on any such land. In case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State. The provisions of this section are subject to all laws and regulations of the United States with respect to navigable waters.

Sec. 54-3-180. Exchange of property; removal of structures.

The Authority may exchange any property acquired under the authority of this chapter for other property usable in carrying out the powers hereby conferred and also may remove from lands needed for its purposes and reconstruction on other locations, buildings, terminals, railroads or other structures upon the payment of just compensation, if, in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for port development, under the authorization of this chapter.

Sec. 54-3-190. Lease or grant of property to United States; reimbursing United States for certain acquisition costs.

The board of the Authority may assign, transfer, lease, convey, grant or donate to the United States of America, or to the appropriate agency or department

thereof, any or all of the property of the Authority for any use by such grantee for any purpose included within the general purposes of this chapter, as stated in Sec. 54-3-130, such assignment, transfer, lease, conveyance, grant or donation to be upon such terms as the board of the Authority may deem advisable. In the event the United States of America should decide to undertake the acquisition, construction, equipment, maintenance or operation of the airports, seaplane bases, naval bases, wharves, piers, ships, refrigerator storage plants, warehouses, elevators, compresses, docks, shipyards, shipping and transportation facilities before referred to, including terminal railroads, roads, highways, causeways or bridges, and should itself decide to acquire the

lands and properties necessarily needed in connection therewith by condemnation or otherwise, the board of the Authority may transfer and pay over to the United States of America, or to the appropriate agency or department thereof, such of the moneys belonging to the Authority as may be found needed or reasonably required by the United States of America to meet and pay the amount of judgments or condemnnation, including costs, if any be taxed thereon, as may from time to time be rendered against the United States of America, or its appropriate agency, or as may be reasonably necessary to permit and allow the United States of America, or its appropriate agency, to acquire and become possessed of such lands and properties as are reasonably required for the construction

and use of the facilities before referred to.

Sec. 54-3-200. Acquisition and operation of terminal railroads.

The Authority may acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports a line of terminal railroads with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles and causeways and in connection therewith or appurtenant thereto may further lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyance or appliance necessary or proper to carry passengers, goods, wares and merchandise over, along or upon the tracks of such railroads or other conveyances.

Sec. 54-3-210. Contracts with railroad employees.

The Authority may make agreements as to the scale of wages, seniority,and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen and hostlers engaged in the operation of the terminal railroads provided for in Sec. 54-3-200 and the service and equipment pertinent thereto. And should the Authority exercise the power herein given then the Authority shall make such agreements with such employees in accordance with the act of Congress known as the Railway Labor Act (USC Title 45, Secs. 151-163) as amended or as hereafter amended to the end that such agreements as to seniority and working conditions will obtain as to such employees and the standard rate of pay be provided as is in

force relative to like employees of interstate railroads operating in the same territory with the terminal railroads authorized hereby.

Sec. 54-3-220. Connecting with or crossing other railroads.

The Authority may with its terminal railroads connect with or cross any other railroad upon the payment of just compensation and receive, deliver to and transport the freight, passengers and cars of common carrier railroads as though it were an ordinary common carrier.

Sec. 54-3-230. Foreign-trade zones.

The South Carolina State Ports Authority is authorized to make application to the Foreign-Trade Zones Board for the purpose of establishing, operating, and maintaining foreign-trade zones in the

State, under the act of Congress known as the Foreign-Trade Zones Act which provides for the establishment, operation and maintenance of foreign-trade zones in the United States.

The South Carolina State Ports Authority shall select and describe the location of the zones for which application may be made and shall make such rules and regulations concerning the operation, maintenance and policing of them as may be necessary to insure compliance with the Foreign-Trade Zones Act and for other appropriate purposes.

The South Carolina State Ports Authority shall have full power and authority to erect, maintain and operate or lease any structures or buildings or enclosures as may be necessary or proper for the establishing, operating, and main-

taining of any such foreign-trade zones in the State of South Carolina.

The authority granted to The South Carolina State Ports Authority confers the right and duty and power to do all things necessary and proper to achieve compliance with the Foreign-Trade Zone Act and to carry into effect establishing, operating and maintaining of foreign-trade zones within the State.

Sec. 54-3-240. Inland ports.

The South Carolina State Ports Authority is authorized to establish inland ports to provide services for the handling of general merchandise cargo; provided, however, that no such inland port shall be established unless it is designated as a United States Port of Entry by the United States Custom Service. The State Ports Authority shall select and

describe the location of any such inland port and may erect, maintain and operate or lease any structure, building or enclosure as may be necessary for the establishment, operation and maintenance of any such port. The Authority shall make such rules and regulations and do such other things as may be necessary to carry out the purposes of this section.

Sec. 54-3-245. Seafood industrial port in Beaufort County.

In addition to the powers granted previously to the State Ports Authority, the Authority may construct, equip and operate a seafood-industrial port in Beaufort County or it may contract with any agency or political subdivision of the State of South Carolina for any or all of these purposes.

Sec. 54-3-250. Inspection of motor vehicles prior to exportation.

No motor vehicle shall be exported to another country through the State Ports, Authority unless the Authority has inspected the vehicle and determines that it is the same vehicle described on the documents required to be filed concerning the exportation of such vehicle.

ARTICLE 5

SUPERVISION OF WHARVES, WAREHOUSES AND OTHER FACILITIES

SEC.

54-3-410. Authority shall have general supervision of wharves, warehouses and terminal facilities.
54-3-420. Examination of facilities.
54-3-430. Requiring repair or improvement of facilities.
54-3-440. Authority may order improvements to facilities on petition.
54-3-450. Unsafe or unsuitable facilities.
54-3-460. Penalties for violations of rules and regulations.
54-3-470. Appeals.
54-3-480. Article inapplicable to portions of Charleston County.

Sec. 54-3-410. Authority shall have general supervision of wharves, warehouses and terminal facilities.

The Authority shall have general supervision in the port of Charleston of all wharves, warehouses and terminal facilities of all transmitting and transporting corporations and of all wharves, warehouses and terminal facilities of persons engaged in business as public warehousemen or wharfingers and shall examine them and keep itself informed as to their condition and the manner in which they are operated, with reference to the security and accommodation of the public and the compliance with all provisions of law applicable thereto.

Sec. 54-3-420. Examination of facilities.

The Authority may examine into all wharves, warehouses and terminal facilities, and the approaches thereto in

Charleston County.

Sec. 54-3-430. Requiring repair or improvement of facilities.

Whenever in the judgment of the Authority it shall appear that repairs are necessary upon any such wharves, warehouses or terminal facilities or that any additions, improvements or enlargements in such wharves, warehouses or terminal facilities or any change in the mode of operating and constructing such business is reasonable and expedient in order to promote the security, convenience and accomodation of the public or to provide facilities required by the business offering at the port of Charleston, the Authority shall give information in writing to the owners or operators of such wharves, warehouses and terminal facilities of the improve-

ments, changes, enlargements and betterments which it judges to be proper and if the owners or operators of such wharves, warehouses and terminal facilities shall fail within sixty days to adopt the suggestion of the Authority, the Authority shall take such legal proceedings as it may deem expedient.

Sec. 54-3-440. Authority may order improvements to facilities on petition.

Upon the written petition of the city council of Charleston or of any of the patrons of any person owning or operating a wharf, warehouse or terminal facility for public uses or for hire, alleging that the plant or equipment in Charleston County of such person is inadequate or unsuited to the public need, the Authority shall fix a time and place for a hearing upon such petition and shall mail notice thereof to the parties

in interest and give due public notice thereof at least one week prior to such hearing. Upon such hearing the Authority may, if it finds the wharf, warehouse or terminal facility to be inadequate or unsuited to the public need, order and prescribe such wharf, warehouse or terminal facility as shall be adequate and suitable and fix a time within which such person owning or operating the same shall construct such additions or improvements. Such person shall thereupon construct such additions or improvements to its plant or equipment within the time so fixed.

Sec. 54-3-450. Unsafe or unsuitable facilities.

The owners or occupiers of any wharf, warehouse or terminal facility within Charleston County shall at all times, as

long as such is used for public purposes, keep it and the sheds thereon and the approaches thereto in proper condition and repair. If such wharf, warehouse, terminal facility, superstructures or the approaches thereto are dangerous to life or limb or unsafe or unsuitable for the persons using them, the Authority shall notify in writing the owner or occupier of such wharf, warehouse or terminal facility to put it in proper repair or condition. If the owner or occupier shall neglect or refuse to put such wharf, warehouse, terminal facility, superstructures or approaches in proper condition within thirty days after notice, such owner or occupier so offending shall be subject to a penalty of one hundred dollars and the further sum of ten dollars for each day such ne-

glect shall continue and shall moreover pay all expense incurred by reason of such neglect or refusal. And if such wharf, warehouse or terminal facility be at such time used for public purposes, the Authority may repair and put it in safe and suitable condition at the expense of the owner or occupier. But the owner or occupier of any such property shall, within ten days after notice is served upon him to repair the same, have the right to apply to the Authority for a hearing.

Sec. 54-3-460. Penalties for violations of rules and regulations.

If any person having a wharf, warehouse or terminal facility used for public purposes in Charleston County shall be guilty of a violation of the rules and regulations provided and prescribed by the Authority, such person owning or

operating such wharf, warehouse or terminal facility shall incur a penalty for each offense of not less than one hundred dollars nor more than three hundred dollars, to be fixed by the presiding judge. An action for the recovery of such penalty shall be in any court of competent jurisdiction in the State where such violation has occurred or wrong has been perpetrated.

Sec. 54-3-470. Appeals.

Any such person may appeal from any order, ruling or requirement of the Authority under this article to the court of common pleas for Charleston County, to be heard and determined by the presiding judge thereof as if tried de novo before him. The judge shall pass upon and determine the reasonableness of such order, ruling or requirement and such

appeal shall stay the execution of any order, ruling or requirement appealed from. No fines or penalties imposed by the Authority shall be operative or commence to run until the final determination of such appeal.

Sec. 54-3-480. Article inapplicable to portions of Charleston County.

The provisions of this article shall not apply to any portion of Charleston County not included in the city of Charleston or in the portion of the county lying to the north of said city and between the Ashley and Cooper Rivers.

ARTICLE 7

ERECTION, REPAIRS AND REMOVAL OF WHARVES, DOCKS AND OTHER STRUCTURES

SEC.

54-3-610. Powers of Authority as to erection or removal of wharves, docks, and other structures.

54-3-620. Permit for construction of wharf or other obstruction.
54-3-630. Penalty for building wharves or other obstructions beyond limits without authority.
54-3-640. Duties of Authority as to repair of docks; owners liable for neglect.
54-3-650. Authority shall prosecute for fines and penalties.

Sec. 54-3-610. Powers of Authority as to erection or removal of wharves, docks and other structures.

The Authority may fix the lines along the bay and harbor of Charleston and the rivers and creeks flowing therein within which riparian owners may erect wharves, docks and other proper erections and fixtures for commercial, manufacturing or any other purposes. The Authority may cause the removal of any wharf, dock, wreck or other structure that may obstruct navigation or that may, in its opinion, be injurious to said bay, harbor, rivers or creeks, at the expense of the owner or the person causing the ob-

structions. But the rights of any owner of a wharf whose lines have heretofore been fixed by grant or by authority of State legislation are in no wise to be disturbed.

54-3-620. Permit for construction of wharf or other obstruction.

No person shall build or extend any wharf or other obstruction in or upon the waters of the bay or harbor of Charleston or the rivers or creeks flowing therein without first obtaining, in writing, from the Authority a permit for so doing, except when the lines of such wharf have been fixed by any grant or by authority of State legislation, under a penalty of twenty dollars for every day such wharf or obstruction shall remain.

Sec. 54-3-630. Penalty for building wharves or other obstructions beyond limits without authority.

No person shall build any wharf or other obstruction beyond the lines so fixed by the Authority except when the lines of such wharf have heretofore been fixed by grant or by authority of State legislation. Any person so doing shall pay the sum of twenty dollars for every such offense and shall moreover be fined in the sum of twenty dollars for every day such wharf or other obstruction shall remain.

Sec. 54-3-640. Duties of Authority as to repair of docks; owners liable for neglect.

The Authority shall examine, or cause to be examined, all the docks, public or private, upon the waters of Charleston bay and harbor and the rivers and creeks flowing therein. When it is the opinion of the Authority that any such dock is not in a proper condition for the pur-

poses for which it was designed and used, it shall cause a notice to be served upon the owner or occupier of such dock and he shall deepen such dock and if such owner or occupier shall neglect or refuse to attend to such dock after thirty days' notice, such person so offending shall forfeit and pay twenty dollars and the further sum of five dollars for every day he shall so neglect or refuse and shall, moreover, pay all expenses incurred by reason of such neglect or refusal.

Sec. 54-3-650. Authority shall prosecute for fines and penalties.

The Authority shall prosecute for fines and penalties under Secs. 54-3-610 to 54-3-640.

ARTICLE 9

PARTICULAR POWERS AS TO HARBOR AND BAY OF CHARLESTON

SEC.
54-3-810. Jurisdiction and powers of Authority over harbor and bay of Charleston.
54-3-820. Deposit of excavated material.
54-3-830. Harbor master and port wardens.
54-3-840. Fees and harbor or port charges.
54-3-850. Payment and disbursement of fees, harbor or port charges, fines and penalties.
54-3-860. Authority shall report annually to General Assembly.

Sec. 54-3-810. Jurisdiction and powers of Authority over harbor and bay of Charleston.

The South Carolina State Ports Authority shall have jurisdiction over the harbor and bay of Charleston and the rivers and creeks flowing therein, may preserve peace and good order in said bay and harbor and shall make such regulations as it may see fit, not repugnant to the laws of the land, for the regulation and government of vessels entering said port and waters so as to provide

for their safe and convenient use thereof and for the protection and preservation of said bay, harbor, rivers and creeks from injury by means of deposit of ballast and other materials, the creation of obstructions or for any other cause whatsoever, with authority to prescribe such penalties for the violation of such regulations as it may deem adequate; provided, that such penalty shall not exceed the sum of five hundred dollars for each offense, together with the expense of removing such obstructions or interferences with navigation. The solicitor of the circuit shall enforce such penalties upon the information and at the request of the Authority.

Sec. 54-3-820. Deposit of excavated material.

When any dredging or excavation shall

be done in said bay and harbor or rivers and creeks or the docks thereon, the material excavated shall be deposited only at such place or places as may be designated by the Authority, under such penalty not exceeding the amount prescribed in Sec. 54-3-810, as the Authority shall prescribe. The Authority shall prosecute for fines and penalties under this section.

Sec. 54-3-830. Harbor master and port wardens.

The Authority may elect or appoint annually a harbor master and such number of port wardens as in its discretion is necessary for the bay and harbor of Charleston and the rivers and creeks flowing therein and may define and assign the duties of such harbor master and port wardens under the rules and

regulations for the government of vessels within or entering into said harbor and waters, or any of them, and for their safe and convenient use of said waters and may regulate their compensation, with power to remove them, or any of them, at its discretion.

Sec. 54-3-840. Fees and harbor or port charges.

The Authority may levy and collect from all vessels entering into and using the port of Charleston such fees and harbor or port charges, not inconsistent with the law, as in its discretion, may be necessary to pay the harbor master and port wardens for the services required of them and to defray the necessary expenses attendant upon the execution of the duties devolved upon it under this article in relation to the regulations for the safety and convenience

of vessels entering said port and waters, or any of them.

Sec. 54-3-850. Payment and disbursement of fees, harbor or port charges, fines and penalties.

All fees, harbor or port charges, fines and penalties collected under the provisions of this article shall be paid over to the Authority and be disbursed by it in paying the salaries of the harbor master and port wardens and such other officers as it may see fit to appoint to facilitate the discharge of the duties imposed by this article and such other expenses as may be incident to such duties. At the end of each fiscal year it shall keep on hand the sum of five thousand dollars as an operating fund, and shall turn over all funds in excess of five thousand dollars to the State port construction fund.

Sec. 54-3-860. Authority shall report annually to General Assembly.

The Authority shall annually report to the General Assembly the amounts received for fees, harbor or port charges, fines and penalties and the disbursement thereof and also generally its acts and doings under this article.

ARTICLE 11

FINANCIAL MATTERS

SEC.
54-3-1010. Issuance of bonds.
54-3-1020. Disbursement of funds; surplus.
54-3-1030. State port construction fund.
54-3-1040. Annual financial statement.
54-3-1050. Property of Authority exempt from taxation.

Sec. 54-3-1010. Issuance of bonds.

As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building structure, terminal railroad or any oth-

er matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain or operate, all or any of them, the Authority may issue bonds, payable both as to principal and interest from the revenues to be derived from the operation of all or any part of its properties and facilities, and the powers and authority granted to counties, cities, school districts and other political subdivisions of the State are hereby extended to and made available to the Authority. All revenue bonds issued by the Authority to obtain funds for the acquisition, construction, equipment, maintenance and operation or its properties and facilities shall be issued in accordance with the provisions of Secs. 6-21-10 to 6-21-570 and all conditions, restrictions and limitations imposed by

said Secs. 6-21-10 to 6-21-570 as amended, shall be observed by the Authority in the issuance of such bonds, except as follows:

(1) A pledge of the net revenues derived from the operation of its properties and facilities, all or any of them, rather than its gross revenues, may be made; and

(2) Free service may, in the discretion of the Authority, be afforded to the United States of America, or any agency, department, corporation or instrumentality thereof, by any property or facility of the Authority to acquire, construct, equip, maintain and operate which funds were obtained from the revenue bonds purchased and held by a

Federal agency, provided such free service is with the consent and at the request of the Federal agency then holding the whole of such revenue bonds.

Sec. 54-3-1020. Disbursement of funds; surplus.

All funds of the Authority shall be deposited in a bank or banks to be designated by the Authority. Funds of the Authority shall be paid out only upon warrants signed by the treasurer of the Authority and countersigned by the chairman or the acting chairman. No warrants shall be drawn or issued disbursing any of the funds of the Authority except for a purpose authorized by this chapter and only when the account or expenditure for which they are to be given in payment has been audited and approved

by the Authority. Any and all net revenues or earnings not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly.

Sec. 54-3-1030. State port construction fund.

The Authority may accept contributions from all persons for the construction and equipping of port facilities and improvements in the ports of the State, and shall place all such contributions in a separate fund to be known as "the State port construction fund," and shall use such fund only for the purpose of engineering, constructing and equipping new port facilities and improving and enlarging existing port facilities.

Sec. 54-3-1040. Annual financial statement.

At least once in each year the Author-

ity shall publish once in some newspaper, published in Charleston County a complete detailed, statement of all moneys received and disbursed by the Authority during the preceding year. Such statement shall also show the several sources from which such funds were received and the balance on hand at the time of publishing the statement and shall show the complete financial condition of the Authority.

Sec. 54-3-1050. Property of Authority exempt from taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon.

D1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW and
SUSAN M. RISTOW, his wife,

Plaintiffs,

COMPLAINT AND JURY DEMAND

-vs-

Case No. 2:91-3677-2

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and THE SS UNKNOWN, an unknown ocean going ship,

Defendants.

NOW COMES the plaintiffs, Fred W. Ristow and Susan M. Ristow, pro se, and as and for their Complaint and claims for relief against the above-named defendants state as follows:

Jurisdiction

1. Federal jurisdiction is based on diversity of citizenship, 28 U.S.C. SS1332(a), in that this is a civil ac-

tion in which the plaintiffs are citizens of the State of Wisconsin, the defendant, South Carolina State Port Authority, is an agency of the State of South Carolina, and the defendant, The SS Unknown, is an unknown ocean going ship whose country of registry is unknown and whose home port or principal place of business is unknown but, upon information and belief, is not within the State of Wisconsin.

The matter in controversy exceeds the sum of $50,000.00, exclusive of interest and costs.

2. Federal jurisdiction is also based on admiralty 28 U.S.C. SS1333, in that this is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears.

Venue

3. This is a civil action where federal jurisdiction is founded on both diversity of citizenship and admiralty. The acts, events, and omissions giving rise to the injuries and claims herein occurred within District of South Carolina, Charleston Division. Venue in the United States District Court for the District of South Carolina, Charleston Division, is therefore proper, pursuant to 28 U.S.C. SS 1391 (b)

The Named Plaintiffs

4. Fred W. Ristow is an adult individual and a citizen of the United States and the State of Wisconsin who resides at W227 S8915 St. Joseph's Drive in the Village of Big Bend, County of Waukesha, and State of Wisconsin. The occupation of the said Fred W. Ristow is that of a truck driver.

5. Susan M. Ristow is an adult individual and a citizen of the United States and the State of Wisconsin who resides at W227 S8915 St. Joseph's Drive in the Village of Big Bend, County of Waukesha, and The State of Wisconsin. The occupation of the said Susan M. Ristow is that of a housewife. The said Susan M. Ristow is the wife of the plaintiff, Fred W. Ristow, and was the wife of the said Fred W. Ristow on December 20, 1988 and at all other times material to this Complaint.

Defendants

6. The defendant, South Carolina State Ports Authority, is upon information and belief, an agency of the State of South Carolina organized and existing under and by virtue of the laws of the State of South Carolina. The said South

Carolina State Ports Authority is, upon information and belief, engaged in the business of managing the ports and harbors lying within the State of South Carolina and overseeing and managing on behalf of the State of South Carolina all operations with respect to such ports and harbors. That, upon information and belief, the principal place of business of the defendant, South Carolina State Ports Authority, is located in the City of Charleston, County of Charleston, State of South Carolina, and said defendant has a mailing address of Post Office Box 817, Charleston, South Carolina 29402.

7. The defendant, The SS Unknown, is an ocean going ship whose identity, registry, home port, and principal place of business are unknown. That despite due

and diligent inquiry of the defendant, South Carolina State Ports Authority, by the plaintiffs, the plaintiffs were unable to obtain any information with respect to the identity, registry, home port, and principal place of business of the defendant, The SS Unknown. That, upon information and belief, the defendant, The SS Unknown, was, on December 20, 1988 and at all other times material to the Complaint, engaged in the business of transporting various goods and materials to and from various locations in the world.

8. That, upon information and belief, the defendant, South Carolina State Ports Authority, was, on December 20, 1988 and at all, other times material to this Complaint, acting as an agent for and on behalf of the defendant, The SS

Unknown.

First Claim For Relief

(Claim of Fred W. Ristow Against Defendants For Ordinary Negligence)

As and for their first claim for relief, the plaintiffs allege as follows:

9. On December 20, 1988 and at all other times material to this Complaint, the plaintiff, Fred W. Ristow was employed as a long haul truck driver and longshoreman by Donald Fanetti, d/b/a Donald Fanetti Trucking, who has his principal place of business located in the City of Franklin, County of Milwaukee, and State of Wisconsin at 6701 W. Ryan Road therein. That, on December 20, 1988 and at all other times material to this Complaint, the said Donald Fanetti was engaged in the business of transporting various goods and materials by

truck to and from various locations throughout the United States and in the business of loading and unloading such goods and materials at their respective points of pick up and delivery.

10. That immediately prior to and on December 20, 1988, while in the course of his employment with Donald Fanetti, the plaintiff, Fred W. Ristow, transported by semi-truck and flat bed trailer a load of steel pipe from the State of Wisconsin to a location within the City of Charleston, County of Charleston, State of South Carolina immediately adjacent to the Atlantic Ocean,, which location upon information and belief, was owned, operated, and managed by the defendant, South Carolina State Authority, and is hereinafter referred to as the "terminal."

11. That upon arriving at the terminal on December 20, 1988, the plaintiff, Fred W. Ristow drove the truck he was operating onto the terminal premises and to a location on said premises at which his cargo of pipe was to be unloaded by employees of the defendant, South Carolina State Ports Authority, and himself.

12. That, upon information and belief, the defendant, The SS Unknown, was to arrive at the terminal on a later date, pick up the load of pipe the plaintiff, Fred W. Ristow, had transported to the terminal, and transport such pipe to a location within the Country of Venezuela.

13. That the pipe transported by the plaintiff, Fred W. Ristow, was organized on the flat bed trailer in the following manner: there were five bundles of pipe

laying on the trailer with each bundle containing four individual pipes.

14. That on December 20, 1988, an unknown employee of the defendant, South Carolina State Ports Authority, was assigned by the said South Carolina State Ports Authority to operate a fork lift truck to unload the pipe from the truck operated by the plaintiff, Fred W. Ristow. The said unknown employee assigned to operate the fork lift on that occasion is hereinafter referred to as the "fork lift driver."

15. That on December 20, 1988, while the plaintiff Fred W. Ristow, was standing on top of a load of pipe on the trailer and assisting in the unloading process, the fork lift driver, with said plaintiff in plain view, negligently picked up the entire load of five bun-

dles of pipe with the fork lift, lost control of said load while traveling in the direction of said plaintiff, and dropped one bundle of pipe thus presenting said plaintiff with an emergency and causing him to jump from truck to avoid fatal injury. That as he jumped, plaintiff was struck in the lower left leg, left ankle, left heel, and left foot by the falling pipe. That as a result of the aforementioned incident, the plaintiff, Fred W. Ristow, sustained severe, traumatic, and disabling injuries which well be described hereafter.

16. That at said time and place, the fork lift driver was negligent in the following respects:

a. In attempting to lift too great a load of pipe with the fork lift he was operating;

b. In failing to properly manage and control both the forklift he was operating and the load of pipe he was attempting to lift;

c. In failing to maintain a proper lookout for the plaintiff, Fred W. Ristow;

d. In failing to exercise due care and caution for the safety of the plaintiff, Fred W. Ristow.

17. That all of the acts and omissions of the fork lift driver constitute the direct, efficient, and proximate cause of the injuries sustained by the plaintiff, Fred W. Ristow.

18. That the plaintiff, Fred W. Ristow, suffered severe, traumatic, and disabling injuries consisting, among other things, of a severe comminuted fracture of the left os calcis (heel)

abrasions, contusions, and discoloration to the lower left leg, left ankle, and left foot, fractures of the left foot and left ankle, destroyed left subtalar joint with significant injury to the calcaneal cuboid joint, and possible dislocations in the left lower extremity. The plaintiff, Fred W Ristow, was required to obtain medical care, comfort, and treatment and was eventually required to undergo a surgical procedure known as a left foot triple arthrodesis with iliac crest bone graft. This plaintiff was incapacitated from work for a period of one and one-half years and has had difficulties in performing the normal duties in life. This plaintiff was for a period of time unable to partake of the joys of life and social activities. This plaintiff verily believes

that the injuries to his left ankle, left heel, and left foot are permanent in nature and that he has suffered permanent, partial disability in the use of his left lower extremity. This plaintiff verily believes that his capacity to enjoy life in the future and his capacity to earn a living in the future have been impaired. This plaintiff has suffered excruciating pain, suffering, and distress in the past and verily believes he will suffer pain, suffering and distress in the future. This plaintiff has suffered economic losses in the past which have been projected in excess of $70,000.00 and verily believes he will suffer economic losses in the future which have been projected in excess of $100,000.00. This plaintiff verily believes he will be required to obtain

medical care, comfort, and treatment for his injuries in the future. As a result of these injuries, this plaintiff estimates he has sustained total damages in excess of $400,000.00.

19. That the defendant, South Carolina State Ports Authority, is vicariously liable, pursuant to the applicable law, for the negligence of its employee fork-lift driver under the doctrines of respondeat superior and agency.

20. That the defendant, The SS Unknown, is also vicariously liable, pursuant to the applicable law, for the negligence of the fork lift driver under the doctrines of respondeat superior and agency.

21. That any governmental tort claim filing requirements under the laws of South Carolina have been waived herein

because of actual notice of this incident and injury to the defendant, South Carolina State Ports Authority, and said defendant's acknowledgment of the occurrence of such incident and injury.

22. That the defendant, South Carolina State Ports Authority, is estopped from raising any governmental tort claim filing requirement and any special governmental tort claim statute of limitations under the laws of South Carolina as defenses herein because of the conduct of its insurance adjustor from Crawford and Company which is described in paragraphs 26 through 34 of this Complaint.

Second Claim For Relief

(Claim of Susan M. Ristow Against Defendants For Losss of Consortium)

23. As and for their second claim for

relief, the plaintiffs reallege all of the allegations contained in paragraph 1 through 22 of this complaint and incorporate the same by reference as though specifically set forth at length herein.

24. The plaintiff, Susan M. Ristow, is the wife of the plaintiff, Fred W. Ristow, and as such she is entitled to his companionship, society, support, health, aid, and consortium.

25. That because of the negligence of the defendants, the plaintiff, Susan M. Ristow, was deprived of companionship, society, support, health, aid, consortium, and services all to her damage in the estimated amount of $10,000.00. That the plaintiff, Susan M. Ristow, verily believes she will sustain a partial loss of these same services, support, comfort, and aid in the future all to her

damage in the estimated amount of $20,000.00.

Third Claim For Relief

(Claim of Both Plaintiffs For Breach of Contract Against South Carolina State Ports Authority)

26. As and for their third claim for relief, the plaintiffs reallege all of the allegations contained in paragraphs 1 through 25 of this Complaint and incorporate the same by reference as though specifically set forth at length herein.

27. That at some point after incident and injuries to the plaintiff, Fred W. Ristow, occurred, the defendant, South Carolina State Ports Authority, advised its insurance carrier, Lloyds of London Insurance Company, of the occurrence of said incident and injuries and an insur-

ance adjustment company, Crawford and Company, of Charleston, South Carolina was retained by the South Carolina State Ports Authorityand its insurance carrier to represent said defendant and its insurance carrier with respect to the plaintiffs' claims.

28. That an employee by the name of Lee Pittillo was assigned by Crawford and Company to handle this matter. That at some point subsequent to December 20, 1988, the plaintiffs were so advised of the involvement and representation by Crawford and Company with respect to their claims.

29. That on a date in the summer of 1990, the plaintiffs had a telephone conversation with Lee Pittillo during which Lee Pittillo offered to settle the plaintiffs' claims against the defend-

ant, South Carolina State Ports Authority, for the sum of $75,000.00.

30. That, upon information and belief, Lee Pittillo was duly authorized by the defendant, South Carolina State Ports Authority, and its insurance carrier to make the above-stated settlement offer to the plaintiffs.

31. That the plaintiffs subsequently accepted this oral settlement offer and a binding oral contract for the settlement of the plaintiffs' claims accordingly existed between the parties. That the plaintiffs anticipated receiving, within a reasonable time, a check in the amount of $75,000.00 from either the defendant, South Carolina State Ports Authority, its insurance carrier, or Crawford and Company, along with an appropriate written statement agreement and

release documentations.

32. That as of this date no check or settlement documentation has been received by the plaintiffs from either the defendant, South Carolina State Ports Authority, its insurance carrier, or Crawford and Company.

33. That the defendant, South Carolina State Ports Authority, has accordingly breached its oral contract for the settlement of the plaintiffs' claims which was entered into by its duly authorized representative by failing to forward a check to the plaintiffs for the settlement amount accompanied by the appropriate settlement documentation. Such action also constitutes bad faith on the defendant's part.

34. That as a result of this breach of contract, the plaintiffs have been

damaged in the amount of $75,000.00.

WHEREFORE, the plaintiffs demand judgment against the defendants as follows:

A. For the sum of Four Hundred Thousand Dollars ($400,000.00) in favor of the plaintiff, Fred W. Ristow, against the defendants, South Carolina State Ports Authority and The SS Unknown, and each of them, with respect to the First Claim for Relief set forth in this Complaint;

B. For the sum of Thirty Thousand Dollars ($30,000.00) in favor of the plaintiff, Susan M. Ristow, against the defendants, South Carolina State Ports Authority and The SS Unknown, and each of them, with respect to the Second Claim

for Relief set forth in this Complaint;

C. For the sum of Seventy-Five Thousand Dollars (75,000.00) in favor of the plaintiffs, Fred W. Ristow and Susan M. Ristow, against the defendant, South Carolina State Ports Authority, with respect to the third Claim for Relief set forth in this Complaint;

D. For costs, disbursements, and attorney's fees of this action;

E. For such other and further relief as to the Court may seem just and equitable.

Dated at Big Bend, Wisconsin, this 7th day of December, 1991.

/s/ Fred W. Ristow
Fred W.Ristow, Plaintiff Pro Se

/s/ Susan M. Ristow
Susan M. Ristow, Plaintiff Pro Se

Plaintiffs' Address:

W227 W8915 St. Joseph's Drive
Big Bend, Wisconsin 53103

Telephone: (414) 662-2774

D25

Jury Demand

The plaintiffs hereby demand trial by a jury of twelve in conjunction with this action as provided by Rule 38 of the Federal Rules of Civil Procedure.

Dated at Big Bend, Wisconsin this 7th day of December, 1991.

/s/ Fred W. Ristow
Fred W. Ristow,Plaintiff Pro Se

/s/ Susan M. Ristow
Susan M. Ristow,Plaintiff Pro Se

Plaintiffs' Address:

W227 S8915 St. Joseph's Drive
Big Bend, Wisconsin 53103

Telephone: (414) 662-2774

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Verification

Fred W. Ristow, having first been duly sworn on oath, deposes and states that he is one of the Plaintiffs in this action and that he has read the foregoing Complaint, and that to the best of his knowledge, information and belief, the facts set forth therein are true and correct.

/s/ Fred W. Ristow
Fred W. Ristow

Subscribed and sworn to before me
this 7th day of December, 1991.

/s/ Leonard W. Schulz
Notary Public State of Wisconsin
My Commission: is permanent

STATE OF WISCONSIN)
) SS
WAUKESHA COUNTY)

Verification

Susan M. Ristow, having first been duly sworn on oath, deposes and states that she is one of the Plaintiffs in this action and that she has read the foregoing Complaint, and that to the best of her knowledge, information and belief, the facts set forth therein are true and correct.

/s/ Susan M. Ristow
Susan M. Ristow

Subscribed and sworn to before me
this 7th day of December 1991.

/s/ Leonard W. Schulz
Notary Public, State of Wisconsin
My Commission: is permanent

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Charleston Division

FRED W. RISTOW AND SUSAN M. RISTOW, his wife,

Plaintiffs,

VS.

SOUTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of South Carolina, and The SS Unknown, an unknown ocean going ship,

Defendants.

CASE NO.: 2:91-3677-2

MOTION TO DISMISS

The Defendant South Carolina State Ports Authority moves the Court to dismiss the action on the ground that the Court lacks jurisdiction over the subject matter as follows:

1. The Defendant South Carolina State Ports Authority alleges and shows and the Plaintiff acknowledged in its Complaint that Defendant is an agency of the State of South Carolina and is completely identified with said State in

the performance of its public functions, that this action against the Defendant South Carolina State Ports Authority is really an action against the State of South Carolina by a citizen of another state, and that this Court does not have jurisdiction over the subject matter of claim against said state because of the Eleventh Amendment to the Constitution of the United States which provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

The sole relief of Plaintiffs against the Defendant is a claim under the South Carolina Tort Claims Act in the State Court.

2. The Defendant South Carolina State Ports Authority is not a citizen for purposes of diversity jurisdiction.

3. The Complaint alleges only land-side torts and actions, and therefore fails to state a claim in admiralty jurisdiction.

VAUGHAN & LAWRENCE, P.A.

By: /s/ Philip L. Lawrence
Philip L Lawrence
23 Broad Street Street
Post Office Box 1559
Charleston, SC 29402
(803) 723-3020
ATTORNEYS FOR DEFENDANT SOUTH CAROLINA STATE PORTS AUTHORITY

February 3, 1992

Charleston, South Carolina

F1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

FRED W. RISTOW AND SUSAN M. RISTOW, his wife,

Plaintiffs,

AFFIDAVIT

VS.

Case No.: 2:91-3677-2

SOUTH CAROLINA STATE FORTS AUTHORITY, and agency of the State of South Carolina, and THE SS UNKNOWN, an unknown ocean going ship,

Defendants.

STATE OF WISCONSIN)
) SS
COUNTY OF WAUKESHA)

FRED W. RISTOW being first duly sworn oath, deposes and states as follows:

1. That affiant is one of the plaintiffs in the above-entitled action and makes this Affidavit in opposition to a Motion To Dismiss brought by the defendant, South Carolina State Ports Authori-

ty.

2. That affiant was injured on the premises of the defendant, South Carolina State Ports Authority on December 20, 1988.

3. That affiant was accompanied to the hospital by a managerial employee of the defendant, South Carolina Ports Au thority. Also affiant was accompanied to the hospital on December 20, 1988 by Lee Pitillo, an Adjuster affiant believes is employed by Crawford and Company who was acting on behalf defendant, South Carolina State Ports Authority and its insurance carrier, Lloyds of London Insurance Company. Affiant was informed by Lee Pitillo that Lloyds of London was at all times material, the insurer for the defendant, South Carolina State Ports Authority.

4. That affiant was led to believe by said Lee Pitillo that affiant could settle his claim for damages arising out of the accident caused by the negligence of an employee of the defendant, Ports Authority, directly with said Lloyds of London by dealing with Lee Pitillo directly and without counsel.

5. That subsequently on or about July of 1990 Lee Pitillo and affiant agreed to a settlement of affiant's claim for Seventy-Five Thousand Dollars (75,000.00).

6. Despite repeated reassurances by Lee Pitillo, no settlement check arrived or was ever tendered to affiant prior to December, 1990.

7. In December, 1990 affiant consulted an attorney in Wisconsin who immediately advised affiant of potential Stat-

ute of Limitation problems and who made inquiry through Threshermen's Mutual insurance Company, the workman's compensation carrier as to the appropriate Statute of Limitations for personal injuries in South Carolina. Affiant's Wisconsin counsel was advised by David Williams, an Adjuster for Threshermen's Mutual Insurance Company, that South had a three (3) year Statute of Limitations and no filing requirements.

8. That affiant immediately retained counsel and changed his position to his detriment because of the breach of contract for settlement that Lloyds of London committed by not forwarding a settlement check within a reasonable time.

9. That affiant verily believes that affiant was intentionally or negligently strung along by Lee Pitillo and Lloyds

of London and that same were agents for the defendant, State Ports Authority.

10. That affiant verily believes that the defendant should be estopped from asserting forum or Statute of Limitation defenses because of the conduct described above.

/s/ Fred W. Ristow
Fred W. Ristow

Subscribed and sworn to before me
this 9th day of March 1992.

/s/ Gail A. Schulz
Notary Public, State of Wisconsin
My Commission expires March 28, 1993.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA,

CHARLESTON DIVISION

SAMUEL COAKLEY,

Plaintiff,

CIVIL ACTION NO. 2:87-1442-2

ORDER

VS.

SOUTH CAROLINA STATE PORTS AUTHORITY; W. DON WELCH, Executive Director, and HENRY TECKLENBURG, JR., H. DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, THEODORE GUERARD, ERNEST L. WILLIS, JOSEPH P. GRIFFITH, HARRY A. CHAPMAN, and THOMAS F. HARTNETT, Members of the Board of the South Carolina State Ports Authority,

Defendants.

Plaintiff is a former employee of the South Carolina State Ports Authority (SPA) and has brought this suit under 42 United States Code section 1983 challenging the constitutionality of his termination. Plaintiff seeks, inter

alia, reinstatement, back pay, and damages. The defendants are the SPA, its Executive Director, and members of the SPA Board of Directors as of June 1, 1987. The individual defendants are all sued in their official capacities only.

This matter comes before the court now on defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A hearing was held on this matter in Charleston, South Carolina, on May 31, 1988. Defendants move to dismiss this action on the ground that SPA is an agency or alter ego of the State of South Carolina, and, therefore, is immune from suit in federal court under the protection of the Eleventh Amendment. Further, the individual defendants argue that they are also immune from suit because they are

being sued in their official capacities, which is actually just another way of suing the State, and, therefore, is barred by the Eleventh Amendment. The individual defendants also rely on the additional ground that they had no personal involvement in the alleged violation of plaintiff's rights, as is required to impose liability under section 1983, and, on its face, the complaint does not allege any personal involvement on their part.

Plaintiff argues that the SPA is not the alter ego or agency of the State and, consequently, is not entitled to Eleventh Amendment protection. Plaintiff further contends that even if the court finds the Eleventh Amendment does apply to the SPA, prospective equitable relief (i.e., reinstatement) can be granted

against the individual defendants under the teachings of Ex parte Young, 209 U.S. 123 (1908).1 Finally, plaintiff argues that defendants' contention that individual officials cannot be sued without a showing of personal involvement relies on cases involving damage claims against officials in their personal capacities whereas, here, defendants are being sued only in their official capacities and equitable relief is available against them under section 1983, regardless of whether the Eleventh Amendment bars plaintiff's claims for damages.

While the Fourth Circuit has recog-

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1 The basic doctrine of Ex parte Young is that a federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally.

nized that many factors must be considered in determining whether an entity is an alter ego or agency of the state, that court has specifically identified and discussed four principal factors.

> [I]t is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . We agree that this is a most important consideration for "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest." Ford Motor Co., 323 U.S. at 464, 65 S.Ct. at 350. Other important inquiries underlying our consideration of eleventh amendment immunity include, but are not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law.

Ram Ditta v. Md. Nat. Capital Park & Planning Comm., 822 F.2d 456, 457-58 (4th Cir. 1987) (footnotes omitted).

In applying these factors to the SPA,

plaintiff first argues that the State Treasury is not responsible for the SPA's expenditures, as explicitly commanded by S.C. Code Ann. section 54-3-140(9) (1976). Plaintiff's Opposition to Defendants' Motion to Dismiss 7. That section reads in full:

> In order to enable it to carry out the purposes of this chapter, the Authority: [m]ay apply for and accept loans and grants of money from any Federal agency for purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or Ctaxing power of the State, or any political subdivision thereof; . . . . (emphasis added).

This section appears to be restricting the SPA with regards to loans and grants from a federal agency, however, there is nothing to indicate that this language is to be read any broader than that or as broad as plaintiff contends. To the contrary, the affidavit of the Chief Financial Officer of the SPA avers that the South Carolina General Assembly appropriated $750,000 for the initial operation of the SPA and made annual appropriations for its operations from 1942 to 1959. Affidavit of William M. Lawrence at Paragraphs 5, 10. Since 1959, the General Assembly has made annual appropriations to pay the principal and interest on general obligation bonds of the State issued to finance capital improvements for the SPA. Id. at Paragraph 6. The State has issued a total of

$105,644,834.30 worth of said bonds to finance SPA's capital improvements, and the proceeds of these bonds were deposited in the State Treasury and distributed to the SPA at the direction of the General Assembly. Id. at Paragraph 7. Although it appears that the operations of the SPA are now essentially self-sustaining,2 plaintiff has failed to establish clearly that the State would not ultimately be responsible for SPA's expenditures, including any judgment that might be awarded against it.

Another factor to consider under Ram

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2 All net earnings of SPA not needed for the operation of its business have been paid into the State Treasury and held subject to further action of the General Assembly; since its creation, SPA has paid a total of $1,552,880.62 of such net earnings into the State Treasury. Affidavit of William M. Lawrence at Paragraph 4.

Ditta is whether the entity exercises a significant degree of autonomy from the state. Plaintiff argues that the SPA has the power to sue and be sued, to make contracts, to acquire and dispose of real estate, and its budget is approved only by its own board, rather than the State Budget and Control Board. Plaintiff's Opposition to Defendants' Motion to Dismiss at 8.

On the other hand, SPA was created by statute as an "instrumentality of the State" for the purpose "[i]n general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State." S.C. Code Ann. Sec. 54-3-130(9). SPA is governed by a board whose members are appointed by the governor with the consent

of the Senate. Sec. 54-3-20. Its property is not subject to any taxes or assessments, Sec. 54-3-1050, and all net earnings "not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly." Sec. 54-3-1020. Further, the SPA has been given broad power of eminent domain "not only as to all property ofprivate persons or corporations but also as to property already devoted to public use." Sec. 54-3-150. Based on the foregoing, we are not persuaded that the SPA exercises a significant degree of autonomy from the State; although it appears that SPA enjoys a certain degree of independence, it is apparent that SPA is not significantly autonomous and shares to a great extent in the States's sovereignty.

A third consideration under Ram Ditta is whether the entity is involved with local versus statewide concerns. Here, it is clear that SPA operates and maintains South Carolina's ports for the benefit of the entire State3 and, consequently, it is primarily involved with statewide concerns.

The final Ram Ditta factor to consider is how the governmental entity is treat-

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3 See. e.g., 54-3-110. State may improve harbors and seaports through Authority.

Through the Authority the State may engage in promoting, developing, constructing, equipping, maintain and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, maintenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

ed as a matter of state law.4 Neither party, however, cites South Carolina case law to support its position, and the court was unable to find any such cases on point. Plaintiff primarily relies upon a district court case from the Southern District of New York, Doris Trading Corp. v. S.S. Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976), and an opinion letter from the South Carolina-Attorney General's Office dated Dec-

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4 Although this is a consideration, the question of whether an entity is an agency or alter ego of the State is a question of federal, not state, law. Ram Ditta, 822 F.2d at 458 n.5 quoting Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979), cert. denied, 447 U.S. 921 (1980).

ember 8, 1987.5 Plaintiff acknowledges, though, that federal district courts in the District of South Carolina have consistently held that the SPA is protected by the Eleventh Amendment, and defendants rely, inter alia, on such cases,

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5 The SPA had instituted an executive incentive pay plan whereby its top executives would receive additional compensation based upon the SPA's annual income and the executives annual salaries. The SPA Board asked the Attorney General's Office for its opinion as to the constitutionality of said practice. In its letter of December 8, 1987 to SPA Board member Thomas F. Hartnett, the Attorney General's Office concluded:

> that the executive incentive pay plan adopted by the governing body of the South Carolina State Ports Authority would probably not be violative of Article 556, Section 30 of the State Constitution or Section 8-15-10 of the Code because the extra compensation would be for services to be rendered in the future by Authority employees who would probably not be considered to be state employees.

e.g. South Carolina State Ports Authority v. Seaboard Air Line Railroad Co., 124 F. Supp. 533 (E.D.S.C. 1954). Of course, none of the authorities cited by either party is binding on this court and, further, they do not evidence how the SPA is treated by the South Carolina state courts.

Although a state court's view of the status-of a governmental entity is a factor for a federal court to consider under the Ram Ditta guideline, questions of Eleventh Amendment immunity are ultimately governed by federal law, Ram Ditta, 822 F.2d at 460, and, consequently, this particular factor is probably the least important one in the alter ego equation. For example, in Ram Ditta the Court of Appeals of Maryland had held that the governmental entity in question

in that case was a state agency and, in turn, the district court relied heavily on that state court's decision in finding that the park' commission was entitled to Eleventh Amendment immunity. On appeal, the Fourth Circuit reversed and concluded that the park commission was not the alter ego of the state because the other three factors, i.e., the state treasury's responsibility for any judgment, the commission's autonomy from the state, and the nature of the commission's functions, all weighed heavily against Eleventh Amendment immunity. Id.

Similarly, in the instant case, our inquiry must go beyond that single f actor of how the SPA may be treated by the state courts and consider "all factors bearing on the federal policy entitling appropriate governmental entities to

eleventh amendment immunity. Id. Balancing all of these criteria, we conclude that the SPA is an agency of the State of South Carolina and, accordingly, is entitled to Eleventh Amendment immunity. Consequently, defendants' motion to dismiss this action as to defendant SPA must be granted.

We are still left to consider defendants' motion as to the individual defendants sued only in their official capacities. Plaintiff has already acknowledged that if the court finds that SPA is protected by the Eleventh Amendment, as we have found, then plaintiff could not recover damages against these individual defendants in their official capacities, since such an award would be tantamount to a judgment against the State and, therefore also prohibited by

the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself), see also, McConnell v. Adams, 829 F.2d 1319, 1329 (4th Cir. 1987). Consequently, the issue remaining as to the individual defendants is whether this suit can be maintained against them only for the prospective relief of reinstatement.

Plaintiff argues that even where a state agency is immune from suit under the Eleventh Amendment, it has been clear since Ex parte Young, 209 U.S. 123 (1908), that prospective equitable relief can be granted against state officials for violations of the United States Constitution. In this case,

plaintiff alleges violations of the Due Process Clause of the Fourteenth Amendment, and thus contends that a suit for a prospective injunction, viz. reinstatement, lies against the individual members of the SPA Board and its executive director in their official capacities.

The holding in Ex parte Young was that a suit challenging the constitutionality of a state officials action is not one against the state in that case, a federal court enjoined the Attorney General of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment, and the Supreme Court held that the Eleventh Amendment did not prohibit issuance of the injunction. The decision in Young was based on the theory that an uncon

stitutional enactment is void and, therefore, does not "impart to him [the officer] any immunity from responsibility to the supreme authority. of the United States." Id. at 160. Further, since the state could not authorize the action, the officer was "stripped of his official or representative character and subjected in his person to the consequences of his individual conduct." Id.

Not all forms of injunctive relief against state officials are available under the Young doctrine, though, because of the bar of the Eleventh Amendment. Consequently, in Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that when a plaintiff sues a state official alleging a violation of federal law, the federal court could award an injunction that governs the of-

ficials future conduct, but not one that awards retroactive monetary relief. The court explained the distinction, as follows:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night. The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in Ex parte Young. . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancil-

> lary effect on the state treasury is a permissible and often an inevitable to consequence of the principle announced in Ex parte Young, supra.
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation. . . . While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State.

Id. at 667-68.

The Young doctrine was recently illustrated in the Fourth Circuit case of McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987). In that case, employees of two Virginia county electoral boards were terminated, and they sued the electoral board members and general county registrar under section 1983 for dam-

ages and for an injunction to reinstate them. The Court of Appeals held that said defendants were acting as state employees and, consequently, the district court erred in awarding damages against them in their official capacities because they were protected by the Eleventh Amendment. Id. at 1329. These defendants were not protected from injunctive relief under the Eleventh Amendment, however, because of the doctrine of Ex parte Young.

> The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding. such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, the order of the district court requiring the appellants to rehire the appellees is also affirmed. Ex parte Young, 209 U.S.

123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)

Id. at 1329-30.

Based on the foregoing, we agree with plaintiff's position in the instant case, that if he can prove the individual defendants sued in their official capacities violated his federal constitutional rights, plaintiff would be entitled to seek prospective injunctive relief against said defendants. Defendants contend, however, that plaintiff will be unable to prove liability against them under section 1983 because plaintiff cannot show that they were personally involved in the alleged deprivation of plaintiff's rights, and, in fact, the complaint fails even to allege any personal involvement on their part. Further, defendants argue that since section 1983 will not support a claim based

on a respondeat superior theory of liability, see Monell v. Dep't. of Social Services of City of New York, 436 U.S. 658 (1978), plaintiff's complaint fails to state a cause of action against them, and the individual defendants should be dismissed. Plaintiff agrees with defendants that officials cannot be sued under section 1983 without a showing that they were personally responsible for plaintiff's injury when the plaintiff is seeking damages, but he argues that personal involvement is not a requirement under section 1983 when the relief sought against the defendants is a prospective injunction. Plaintiff cites no authority for this position.

In considering a motion to dismiss, a complaint must be construed in the light most favorable to the plaintiff and its

allegations are taken as true. 5 C. Wright A. Miller, Federal Practice and Procedure, Sec. 1357 at 594. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cruz v. Beto, 405 U.S. 319, 322 (1972), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

As the defendants contend, the complaint in this case does not allege personal involvement by the individual defendants. The complaint does allege, however, that said defendants have "ultimate supervisory responsibility for SPA operations," Complaint Paragraph 5, and it is well-established in the Fourth Circuit that under section 1983 "super-

visory officials may be liable in certain circumstances for the constitutional injuries inflicted by their subordinates." Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); see also Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981). Liability in this context is not based on respondeat superior, "but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict ..." Id. Supervisory liability in this context may extend to the highest levels of state government. Id. at 373. "The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indif-

ference permitted the constitutional abuses to continue unchecked." Id. Consequently, this determination of liability generally turns on the facts and not law. Id.; see also Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981).

Turning to the facts here, according to Paragraph 5 of plaintiff's complaint, defendants Willis, Hartnett, and Guerard were not members of the SPA Board at the time of the events alleged in the complaint. Consequently, said defendants could not be persons in the decisionmaking chain whose supervisory indifference may have been a causative factor in the constitutional injuries allegedly inflicted on plaintiff. On the other hand, defendants Tecklenburg, McElveen, Royall, Moore, Griffith, and Chapman were

members of the board at the time of said events and Welch was SPA's executive director; accordingly, these defendants' supervisory indifference could have been a causative factor in this case.

The plaintiff must meet a heavy burden of proof in supervisory liability cases and, ordinarily, it cannot be satisfied by pointing to a single incident or isolated incidents. Slakan, 737 F.2d at 373. Still, in considering this complaint in the light most favorable to the plaintiff, it does not appear to us beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to the equitable relief requested. Cruz v. Beto, 405 U.S. at 322. Consequently, we must deny the individual defendants' motion to dismiss as to defendants Welch, Tecklenburg,

McElveen, Royall, Moore, Griffith, and Chapman. Said motion is granted, however, as to the defendants who were not members of the board at the time of the alleged events, viz., as to defendants Willis, Hartnett, and Guerard.

In summary, defendant SPA's motion to dismiss is granted because it is an agency of the State and, therefore, entitled to Eleventh Amendment protection. Similarly, the Eleventh Amendment protects the individual defendants sued in their official capacities from an award for damages. Plaintiff may, however, maintain its suit against the individual defendants Welch, Tecklenburg, McElveen, Royall, Moore, Griffith, and, Chapman for the prospective relief of reinstatement. Defendants Willis, Hartnett, and Guerard are dismissed from the case be-

cause plaintiff could not possibly prove supervisory liability against them under section 1983, since they were not members of the board at the time of the alleged events.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

DATED:

At Florence, South Carolina

July 15, 1988.

Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 94-428

In The

Supreme Court of the United States

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

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QUESTIONS PRESENTED

Do the Federal Courts have jurisdiction over actions against a State Agency when the State has designated that such actions are to be brought only in that State's Court?

Is the South Carolina State Ports Authority one of those special state affiliated bodies which are denied Eleventh Amendment Immunity?

Has the United States Court of Appeals for the Fourth Circuit rendered a decision that "created additional conflict or sharpened existing conflicts" between the opinions of the Second Circuit Court of Appeals and the Third Circuit Court of Appeals?

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No. 94-428

In The

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October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the Eleventh Amendment of the United States Constitution, set forth on page C1 of Petitioners' Appendix, and Article X, section 8 of the South Carolina Constitution which reads as follows:

> Money shall be drawn from the treasury of the State or the treasury of any of its political subdivisions only in pursuance of appropriations made by law.

The statutes involved are quite lengthy, and their texts are located in the two Appendices. *S.C. Code Ann.* § 54-3-10 *et seq.* (1976 and Supp. 1992) is found on page C2-54 of Petitioners' Appendix. In Respondent's Appendix, the following statutory provisions are found: *S.C. Code Ann.* §§ 2-17-130; 8-13-100; 9-1-10; 9-1-20; 15-78-10; 15-78-20; 15-78-30; 15-78-40; 15-78-100; 15-78-110; 30-4-15; 30-4-20; 30-4-30; 42-7-10; 42-7-40; 42-7-60; 48-39-150.

STATEMENT OF THE CASE

Error and Omissions in Petitioner's Statement of Case

I. The Parties

The nature and status of the Defendant South Carolina State Ports Authority ("Authority") is the principal issue. The scanty and argumentative description of the Authority by the Petitioner is inadequate.

The following facts were presented to the Court of Appeals:

The Authority was created by 1942 Act Number 626 of the South Carolina General Assembly. This Act is now incorporated in *S.C. Code Ann.* §§ 54-3-10 to 54-3-1050 (1976 & Supp. 1992).

The Authority is governed by a Board, all the members of which are appointed by the Governor of the State

of South Carolina, with the advice and consent of the South Carolina Senate. *S.C. Code Ann.* § 54-3-20 (1976).

The property of the State Ports Authority enjoys the same immunity from state and local taxes or assessments as do the other departments and agencies of the State. *S.C. Code Ann.* § 54-3-1050 (1976).

All net earnings of the State Ports Authority not necessary or desirable for the operation of its business shall be and have been held subject to further action of the South Carolina General Assembly. *S.C. Code Ann.* § 54-3-1020 (1976).

The South Carolina General Assembly appropriated Seven Hundred Fifty Thousand Dollars for the initial operation of capital and maintenance of the port's facilities of the State Ports Authority. The General Assembly of the State of South Carolina made annual appropriations for the operation of the State Ports Authority for the years 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959.

Since 1959, the General Assembly of the State of South Carolina has made annual appropriations to pay the principal and interest on general obligation bonds of the State of South Carolina issued to finance certain capital improvements for the State Ports Authority.

The State of South Carolina has issued a total in excess of One Hundred Thirty-two Million Dollars worth of general obligations bonds to finance certain capital improvements for the Authority. The proceeds of these bonds were deposited in the State Treasury and were

distributed to the Authority on the direction of the General Assembly.

The employees of the State Ports Authority are under the State Employees Workers' Compensation Plan *S.C. Code Ann.* §§ 42-7-10, 42-7-40, 42-7-60, and the South Carolina Retirement System (for State employees) *S.C. Code Ann.* §§ 9-1-10, 9-1-20.

The Authority is, and has engaged in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, namely, Port Royal, Charleston and Georgetown for handling of water-borne commerce from and to any part of the State and other states or foreign countries and the fostering of the shipment of freight and commerce through said ports, whether originating within or without the State. *S.C. Code Ann.* § 54-3-130 (1976).

The Authority has a broad power of eminent domain and has exercised this power. *S.C. Code Ann.* 54-3-150 (1976, as amended).

The Authority has the power to take exclusively, occupy, and use and possess insofar as may be necessary to carry out its functions, any area of land owned by the State of South Carolina, the counties of Beaufort, Georgetown and Charleston, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, and the sea and arms thereof and other waters of the State and riparian rights thereto pertaining and the said State Ports Authority has exercised this power. *S.C. Code Ann.* § 54-3-170 (1976 Supp. 1992).

The general obligation bonds issued by the State of South Carolina to fund some of the projects of the State Ports Authority are paid (both interest and principal) from the general state funds appropriated by the General Assembly.

In addition, revenue bonds have been issued by the State Ports Authority to fund some of the projects of the State Ports Authority and are authorized by State law. *S. C. Code Ann.* § 54-3-1010 (1976, as Amended). Other agencies of the State issue revenue bonds in the same manner as does the State Ports Authority. The State Ports Authority revenue bonds are tax exempt.

In 1992, the State of South Carolina designated the Authority as the agency to acquire the site for the new BMW plant in Spartanburg County and to perform other obligations of the State to BMW. Thirty-two Million Dollars were transferred from the State Treasury to the account of the State Ports Authority to pay the purchase price of the land. An additional Eight Million Dollars was transferred to prepare the site for BMW's use. The Authority also used Five Million Dollars of funds already in its account to provide additional funds to acquire the property for this plant site.

The State Ports Authority is listed as an agency for the State in each annual Legislative Manual, and its operations are included in each annual Comprehensive Financial Statement of the State of South Carolina.

The Authority has no stock, no stockholders, and no private interests in its operations.

The Authority and its officials and employees are subject to the State Ethics Act. *S.C. Code Ann.* § 2-17-130 and § 8-13-100.

The Authority appoints and hires the Executive Director of the Authority, and he serves at the pleasure of the board. The Board of the Authority supervised the employment of all other employees of the Authority.

The Staff of the Authority works with the staff of the other State agencies on a daily basis.

The Authority publishes its annual report in newspapers throughout the State (*S.C. Code Ann.* § 54-3-1040) and delivers it to the General Assembly. (*S.C. Code Ann.* § 54-3-860).

The Authority has quasi-police type controls over the Port (See title 54 of S.C. Code) and must approve (*S.C. Code Ann.* § 54-3-610, *et seq.*) or certify all private piers in the Port of Charleston, and in other critical areas. (See §§ 48-39-150.)

Loss claims and legal actions against the State Ports Authority are controlled by the South Carolina Tort Claims Act. *S.C. Code Ann.* §§ 15-78-10, 15-78-20, 15-78-30, 15-78-40, 15-78-100, 15-78-110, and the State Ports Authority is subject to the S.C. Freedom of Information Act *S.C. Code Ann.* §§ 30-4-15, 30-4-20, 30-4-30. The Authority may hold property either in its name or in the name of the State (*S.C. Code Ann.* § 54-3-140).

The State Ports Authority is an agency of the State of South Carolina, is in a real sense a part of the State and shares in its sovereignty, and is completely identified

with the State and the performance of its functions which are unquestionably of a governmental character.

II. The Incident in Question

The Authority generally denies the recitation of events. The gist of the Petitioner Ristow's complaint is that in 1988, while unloading his truck on State terminal property landside, the cargo slipped and Ristow was hurt. He claims the accident was the state's fault. Most of the corrections are irrelevant to the appeal. Some of the specific corrections are listed in Respondent's Appendix at page 3. We note here some important fact omissions.

The first and second claims alleged in Plaintiff's Complaint are covered by the South Carolina Tort Claims Act. *S.C. Code Ann.* § 15-78-110 provides that any action under the S.C. Tort Claims Act is barred unless commenced or a verified claim filed within two years after the occurrence. *S.C. Code Ann.* § 15-78-100 requires that the action be brought in the State Circuit Court in the County where the act or omission occurred. *S.C. Code Ann.* § 15-78-20(e) specifically states

> (e) Nothing in this chapter is construed as a waiver of the State's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

Plaintiff commenced this action in the United States District Court for the District of South Carolina almost three years after the incident of December 20, 1988, and

Plaintiff never filed a verified claim. (Appendix of Petitioners at D15 and D16). Plaintiff claimed a waiver disallowed under South Carolina Law (Appendix of Petitioners at D15 and D16 and *Rink v. Richland Memorial Hospital*, ___ S.C. ___, 422 S.E.2d 747 (1992) and *Searcy v. Dept. of Education*, 303 S.C. 544, 402 S.E.2d 486 (Ct. App. 1991)).

SUMMARY OF THE ARGUMENT

Petitioner's claim is basically a claim in tort against the Authority which is subject to the S.C. Tort Claims Act. The S.C. Tort Claims Act specifies that such claims must be brought in the state courts and denies any waiver of the Eleventh Amendment. The Petitioners elected to bring the action in federal court in violation of the terms and conditions of the Tort Claims Act.

The Authority was created and was and continues to be controlled by the state. All its funds and assets come from the state. It is known generally and regarded as the "State Ports Authority." The Authority's capital investments were funded by state general obligation bonds pledging the full faith and credit of the state. The state pays annually both principal and interest on such bonds. The Authority raises its operating funds by renting the state property and by fees collected for the services rendered by state employees.

No local governments contribute any funds or have any control over the Authority. The Authority's activities are statewide, serving the citizens of South Carolina and

other states. The Authority has no charter, is not incorporated, has no stockholder, and all the members of its controlling board are appointed by the Governor of South Carolina with the consent of the South Carolina Senate.

This Court of Appeals decision is not in conflict with the decision of any Court of Appeals as modified by this court. This decision confirms the decisions on this subject in the United States District Court for the District of South Carolina over approximately the last 50 years.

ARGUMENT

I. General Discussion of the Eleventh Amendment

The basic questions under the Eleventh Amendment are: is the state public body claiming such immunity the alter ego of the state; is the state the real party in interest; and, would a judgment against such body expose State property and funds? All of these basic questions are easily answered – yes. Note that the Petitioners' Complaint described the Authority as "an agency of the State of South Carolina." Also Petitioner said the State is the Authority's stockholders (Petition for Cert. page 57). The Petitioners argue that the Eleventh Amendment applies only when the state is named or when a judgment against the state official, department, agency, or authority would expose the account denominated as the "State Treasury." The Eleventh Amendment is not so restricted and none of the authorities Petitioners cited say that.

If the Eleventh Amendment were to be interpreted as Petitioners contend and applied to the South Carolina

government: none of the Executive or judicial branches of the government would be entitled to Eleventh Amendment protections. The South Carolina Constitution provides: "Money shall be drawn from the Treasury of the State . . . only in pursuance with appropriations made by law." *S.C. Constitution*, Article X § 8. Today all state governments operate through officials, departments, bureaus, agencies, and authorities. The Plaintiff's interpretation would permit a litigant to avoid the Eleventh Amendment by making the specific agency or department the defendant. They now all have their own stationary and accounts. In the case at hand the Plaintiff came to federal court to avoid the limitations and restrictions contained in the S.C. Tort Claims Act. This is one of the very abuses the Eleventh Amendment was designed to prevent.

Petitioner argues "The central goal of the Eleventh Amendment is to shield state treasuries from federal court judgments" (Petition for Cert., p. 21). None of the cases cited by petitioners make such a statement or holding. They say only that protection of state funds is a very important factor to be considered.

In *Penhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 906, 79 L.Ed.2d 67 (1984), the court said the intent of the framers of the Eleventh Amendment was "that States could not be made unwilling defendants in federal court" (*Id.* at 98, n. at 7) and "the fundamental principle of sovereign immunity limits the grant of judicial authority in article III." (*Id.* at 98).

The Eleventh Amendment protects the right of the states to handle their own affairs with citizens of other

states and foreign countries as long as no federal or national issues are involved. It is more than just protection for an account labeled "the State Treasury." Petitioner's unreasonably narrow interpretation of the Eleventh Amendment would open the federal courts to arbitrate disputes involving the states which involve no national interests.

II. Do Federal Courts have Jurisdiction over Actions Against a State Agency When the State has Designated that Such Actions are to be Brought in the State's Courts?

The discussion in *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed. 389 (1945), answers this question with a no. In that case the court held that when a state made a limited waiver of sovereign immunity and specified that citizens should sue the state in its state courts, the federal courts should honor this specification and grant Eleventh Amendment immunity in federal court unless the state waived immunity in federal court. In the case at hand, South Carolina expressly reserved its Eleventh Amendment immunity.

The Complaint alleges a claim of negligence against the State Ports Authority. Torts against the state are governed by the South Carolina Tort Claims Act, *S.C. Code Ann.* §§ 15-78-10, *et seq.* (enacted 1986). This act expressly includes state authorities. *S.C. Code Ann.* §§ 15-78-30 and 15-78-40. Therefore, unlike many of the older federal cases where Eleventh Amendment immunity was denied,

the state here has provided a forum for Plaintiffs' Complaint.

All claims mentioned by the Complaint arose after passage of the S.C. Tort Claims Act. This Act states that the General Assembly intended to grant immunity from liability and suit in tort except as waived in the Act. *S.C. Code Ann.* § 15-78-20(b). The Act further expressly states in part that: "Jurisdiction for any action brought under this Chapter is in the Circuit Court and brought in the county in which the act or omission occurred." *S.C. Code Ann.* §§ 15-78-100(b). Furthermore, § 15-78-20(e) specifically disclaims any waiver of the state's Eleventh Amendment immunity.

The designation by the state of where suit may be brought is to be given effect under the Eleventh Amendment. As stated by this Court, "A State's Constitutional interest in immunity encompasses not merely whether it may be sued, but *where* it may be sued." *Penhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L.Ed.2d 67 (1984) (emphasis added). It is established law that waiving immunity for suit in its own Courts does not constitute waiver of the Eleventh Amendment or consent to submit to jurisdiction in Federal Courts. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L.Ed.2d 175 (1985).

Therefore, since the state has provided a forum for this type of action, this suit should have been brought in State Court, and was properly dismissed from federal court.

III. Is the Authority One of Those Special State Affiliated Bodies Which are Denied Eleventh Amendment Immunity?

A. Petitioner's Action Is Against State Funds and Property.

Petitioner argues that, although the Authority is an agency of the State of South Carolina, it should be denied Eleventh Amendment immunity because it is possible or arguably probable that any judgment will not be paid out of the account labeled "the State Treasury."

Any judgment against the Authority would be paid with state funds, or by the sale of state property, or by insurance whose premiums were paid with state funds. All funds available to the Authority come from the state treasury, from rental of state property, or from fees charged for services rendered by state employees.

Indeed, had Petitioner commenced his action in the prescribed court and within the prescribed time, the judgment would have been against the South Carolina State Ports Authority account at a time when it contained $40 Million of general state funds. None of the cases cited by Petitioner contain the comingling of state funds which are present in this case. While the account labeled "State Treasury" was protected, state funds and state property were not.

If the General Assembly decided to abolish the Authority, no person or body could claim the property and the funds then in the name of the Authority against

the state. Applying an "actual financial analysis", everything in the Authority's name belongs to the state and Petitioner's action is one for recovery of money from the state. "And when the action is in essence one for recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit. . . . " *Ford Motor Co., v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464, 655 S. Ct. 347, 89 L.Ed. 389 (1945). Petitioner's interpretation of the Eleventh Amendment is unreasonably narrow and technical.

B. Procurement of Insurance Should Not Cause Loss of Eleventh Amendment Immunity.

Purchase of insurance is simply a good business practice to protect the state from financial disaster. The Eleventh Amendment should never be construed to protect only those United States who do not protect themselves with insurance. Procurement or non-procurement of insurance is not a valid test of statehood.

Petitioner cited three Court of Appeals decisions to support their claim that purchasing insurance should be fatal to Eleventh Amendment immunity. Petitioner claims that procurement of insurance was a key factor in each case. A review of the cases shows otherwise.

In *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991), cert. den., ___ U.S. ___, 112 S. Ct. 2281, 119 L.Ed.2d 206 (1992), the court found that only 27% of that Authority's revenues came from the state, (*Id.* at 819); that the Authority could not pledge the credit of the state and the state was not liable

for payment of principal and interest on the bonds issued (*Id.* at 819); that Authority had a separate corporate existence (*Id.* at 820); and that only 5 of that Authority's 15 board members were appointed by the state (the others were appointed by counties). The only mention of insurance was a statement that that Authority had the power to "buy insurance." (*Id.* at 820). This case is no authority for Petitioner's assertion.

In *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir. 1989), cert. den., 493 U.S. 850, 110 S. Ct. 148, 107 L.Ed.2d 107 (1989), the court found that NJT received substantial annual operating subsidies from the federal government (*Id.* at 660); that federal and local sources provided most of NJT's capital (*Id.* at 660); that NJT is self insured and had the authority to purchase insurance (*Id.* at 660). Here the court noted that at least part of any judgment would be paid by insurance (*Id.* at 661). Still, this is a long way from saying that a pure state agency such as the South Carolina State Ports Authority should be denied Eleventh Amendment immunity just because it has insurance.

In *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992), the court found that PRPA operations were proprietary rather than governmental (*Id.* at 10); that any judgment would likely be paid out of operating funds (*Id.* at 10); that PRPA had a legal existence separate and apart from those of the Commonwealth (*Id.* at 11). PRPA had to pay a fee in lieu of taxes (*Id.* at 12). In this case the court pointed out as an aside "Further, the Ports Authority has insurance which would insulate the Commonwealth treasury from the effects of an adverse judgment." The principal basis for denying

immunity in the *Royal Caribbean* case, *supra*, was its determination that ports authority activities were proprietary rather than governmental notwithstanding the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S. Ct. 1005, 83 L.Ed.2d 1016 (1984).

None of these decisions make procurement of insurance a key issue. We suggest that procurement of insurance should never be a key issue in whether a state receives Eleventh Amendment protection. We have enough bad business management in government; there is no need to encourage it.

C. The Authority Enjoys Continued Funding by the State.

Petitioner argues that the Authority lacks a "continued funding provision", ignoring the State's continuing payment of the principal and interest on the general obligation bonds issued to fund the Authority's capital expenses and the funding of projects beyond the Authority's capabilities.

Petitioner's terminology comes apparently from the *Feeney v. Ports Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989) aff'd on other grds, 495 U.S. 299, 110 S. Ct. 1868, 109 L.Ed.2d 264 (1990). The defendant in that case was a terminal railroad corporation owned by the bi-state New York and New Jersey Port Authority. The two states signed a compact to create that port authority. The states were each committed to pay up to $100,000.00 for the operating expenses of that port authority if its funds were

inadequate. The New York and New Jersey Ports Authority is a special body. Most state authorities have no commitment that the state will continue to fund it or will even continue to keep it in existence.

The South Carolina State Ports Authority has no commitment from the General Assembly that it will continue to fund the Authority or that the State will continue to keep in existence.

D. The Court of Appeals Found That the Authority Met the Fourth Circuit Tests for Eleventh Amendment Immunity.

The Court of Appeals for the Fourth Circuit applied that circuit's test for Eleventh Amendment immunity found in the *Ram Ditta v. Maryland National Capital Park and Planning Commission*, 822 F.2d 456 (4th Cir. 1987). The *Ram Ditta* test is as follows:

(1) whether the state treasury will be responsible for paying any judgment that might be awarded;

(2) whether the entity exercises a significant degree of autonomy from the state;

(3) whether it is involved local versus statewide concerns; and

(4) how the entity is treated as a matter of state law (Petitioner's Appendix, pages 6 and 7).

The first three were found to favor immunity, and the fourth was inconclusive.

While state decisions were inconclusive on the issue (because it has never been raised), the Court of Appeals

found that the United States District Court for the District of South Carolina has consistently found the Authority to be the Alter Ego of the State and granted it Eleventh Amendment immunity over a 50 year period. (Petitioner's Appendix page 26).

The Court of Appeals also considered the forum designated in the S.C. Tort Claims Act as the exclusive forum for Petitioner's claim. (Petitioner's Appendix p. 27). This also compelled a grant of Eleventh Amendment immunity.

The cases cited by Petitioner show the type of state related bodies which are denied Eleventh Amendment immunity by some of the Courts of Appeal. You will notice that they are significantly different from the South Carolina State Ports Authority.

IV. Has the United States Court of Appeals for the Fourth Circuit Rendered a Decision That "Created Additional Conflict or Sharpened Existing Conflicts" Between the Opinions of the Second Circuit Court of Appeals and of the Third Circuit Court of Appeals?

The Petitioners have tried to create the appearance of a conflict among the circuits. Petitioners point to two cases, one in the Third Circuit, *Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3rd Cir. 1987), cert. den., 484 U.S. 953, 108 S. Ct. 344, 98 L.Ed.2d 370 (1987), and one in the Second Circuit, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), aff'd on other grds 495 U.S. 299, 110 S. Ct. 1868, 109 L.Ed.2d 264 (1990), as

evidence of this conflict. Petitioners claim that the Third Circuit has used a "broad financial approach", while the Second Circuit has supposedly used an "actual financial analysis" (both terms having been coined by Petitioners.)

In truth, whatever conflict may have existed between the Circuits in those cases has been resolved on the Supreme Court level. The Fourth Circuit's decision in the present case merely follows the more practical approach of the Third Circuit in granting Eleventh Amendment immunity to a state agency which has become in some ways self sufficient (Appendix, 16 and 17). In the *Port Police* case, the Third Circuit found that the Port Authority for New York and New Jersey was entitled to Eleventh Amendment immunity. *Port Police*, 819 F.2d at 418. This Court left that decision undisturbed and denied certiorari.

A conflict was created when the Second Circuit in the *Feeney* case found that the same Port Authority was not entitled to Eleventh Amendment immunity, or in the alternative, had waived its immunity through a state statute. *Feeney*, 873 F.2d at 628-629. This court resolved that conflict when it decided the *Feeney* case. The Supreme Court assumed that the Port Authority was entitled to Eleventh Amendment immunity, but that the State of New York had waived it. Thus, that conflict was ended.

Furthermore, there is a fundamental difference between the Authority here and the Port of New York and New Jersey. Unlike the New York/New Jersey Port, the South Carolina Authority was not formed by a bi-state compact. Instead, it is a traditional agency of one state, operating within that state, and serving the purposes of that state.

As Petitioners acknowledge in their Supplemental Brief, the case of *"Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed.2d 401 (1979), is believed to have established a presumption against Eleventh Amendment immunity for entities created by interstate compact." Petitioners' Supplemental Brief, p. 8. Such a presumption does not exist in the present case, so the Fourth Circuit was correct in using a broader approach than the approach necessary to judge the Port of New York and New Jersey.

The Fourth Circuit, finding facts at least as strong as those involved with the Port of New York and New Jersey, found that the Authority here was entitled to Eleventh Amendment immunity, and that this immunity had not been waived.

CONCLUSION

The Respondent Authority asks this Court to deny certiorari in this case.

Respectfully submitted,

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Charleston, SC 29402
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Attorneys for Respondent
South Carolina State Ports Authority

October 6, 1994
Charleston, South Carolina

No. 94-428

In The

Supreme Court of the United States

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

THE SOUTH CAROLINA STATE PORTS AUTHORITY and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX FOR BRIEF IN OPPOSITION OF RESPONDENT, THE SOUTH CAROLINA STATE PORTS AUTHORITY

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Technical Corrections to Petitioner's Statement of Case

II. The Incident in Question

The Authority disputes the facts of the incident involved as set forth in the first paragraph on pages 5 and 6 of Petition for Certiorari. We acknowledge that Petitioner had an accident on that day, and at that general location, and that he may have been injured. In the second paragraph the insurer is incorrectly identified as Lloyds of London. The insurance carrier is a group of corporate insurers belonging to the London Institute of Underwriters. (A list of insurers is at page 4 in the Appendix).

We have no direct knowledge of what happened between Petitioners and the insurance adjuster, but doubt that he discouraged Petitioners from retaining counsel

We have no direct knowledge of the matters in the paragraph on page 7. We are informed and believe that the adjuster ordered a check for $75,000.00. When the check arrived, he tendered the check to Petitioners but refused to accept check or sign settlement papers. At that time, Petitioners advised the adjuster that they would retain counsel. The adjuster advised them that the statute of limitations would run in a few days, and that they should act promptly.

On page 8 of the Petition, the complaint speaks for itself. The Authority denied the paragraph on 8 and 9 on jurisdiction. The Authority's motion and Petitioners' response speak for themselves. On pages 10 through 17, the orders and decisions speak for themselves.

11.111%	COMMERCIAL UNION ASSURANCE CO. PLC
11.111%	OCEAN MARINE INSURANCE COMPANY LTD.
7.407%	INDEMNITY MARINE ASSURANCE COMPANY LTD. "T" A/C
5.926%	PRUDENTIAL ASSURANCE COMPANY LTD. TRUST NO. 2 A/C
5.926%	PHOENIX ASSURANCE PLC L A/C PER: THE LONDON ASSURANCE
5.926%	LONDON & HULL MARITIME INSURANCE COMPANY LTD.
5.925%	INSURANCE COMPANY OF NORTH AMERICA (UK) LTD "C" A/C
5.556%	NORTHERN ASSURANCE COMPANY LTD U/W AGENCY NO. 5 A/C
3.056%	ORION INSURANCE COMPANY PLC T A/C
0.370%	SKANDIA U.K. INSURANCE PLC T A/C
0.278%	YASUDA FIRE & MARINE INSURANCE CO. OF EUROPE LTD. T A/C
2.108%	SOVEREIGN MARINE & GENERAL INSURANCE CO. LTD.
0.309%	THE TOKIO MARINE & FIRE INSURANCE CO. (U.K.) LTD.
0.412%	TAISKO MARINE & FIRE INSURANCE CO. (U.K.) LTD.
0.206%	STOREBRAND INSURANCE COMPANY. (U.K.) LTD.
0.154%	ATLANTIC MUTUAL INSURANCE COMPANY
0.206%	ALLIANCE INTERNATIONAL INSURANCE CO. LTD.
0.309%	WAUSAU INSURANCE COMPANY (U.K.) LTD.
3.704%	THREADNEEDLE INSURANCE COMPANY LTD.

3.704%	PHOENIX ASSURANCE PLC A A/C PER ALLIANCE ASSURANCE CO. LTD.
2.222%	NORWICH UNION FIRE INSURANCE SOCIETY LTD. NO. 1 A/C
2.963%	MINSTER INSURANCE COMPANY LTD. NO. 3 A/C
2.222%	SCOTTISH LION INSURANCE COMPANY LTD.
2.963%	BISHOPSGATE INSURANCE LIMITED "M" A/C
1.852%	PHOENIX ASSURANCE PLC
0.787%	ENGLISH & AMERICAN INSURANCE COMPANY LTD.
0.556%	SWITZERLAND INSURANCE COMPANY (U.K.) LIMITED
0.324%	NIPPON FIRE & MARINE INSURANCE CO. (U.K.) LTD.
0.185%	FUJI FIRE & MARINE INSURANCE COMPANY (U.K.) LTD.
0.926%	HANSA MARINE INSURANCE COMPANY (U.K.) LTD.
0.926%	VESTA (U.K.) INSURANCE COMPANY LTD.
1.111%	ATLAS ASSURANCE COMPANY LTD T A/C
1.111%	BALTICA SCANDINAVIA INSURANCE COMPANY (U.K.) LTD.
1.111%	LA REUNION FRANCAISE SOC. ANON. D'ASSURANCES ET DES REASSURANCES P.L. A/C
1.852%	FIREMAN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY U.K. BRANCH (MOAC)
1.852%	CORNHILL INSURANCE PLC "C" A/C
1.185%	ANDREW WEIR INSURANCE COMPANY LTD.
0.296%	ANDREW WEIR INSURANCE COMPANY LTD. "W" A/C

1.481%	ASSICURAZIONI GENERALI
0.370%	COLONIA INSURANCE COMPANY (U.K.) LTD.
100.000%	

LIMIT: US $20,000,000.00
12 MONTHS AT AUGUST 1, 1988

ALL OF THE INSURERS ARE MEMBERS OF THE INSTITUTE OF LONDON UNDERWRITERS

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§ 2-17-130. Penalties For violations of provisions of this chapter.

(A) A lobbyist or a lobbyist's principal who wilfully violates the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than one year, or both. In addition, any lobbyist or lobbyist's principal convicted of or pleading guilty or nolo contendere to a misdemeanor under the provisions of this section is barred from acting as a lobbyist or a lobbyist's principal for a period of three years from the date of the conviction.

(B) A member of the General Assembly, the Governor, the Lieutenant Governor, any other statewide constitutional officer, any public official of any state agency who engaged in covered agency actions, or any of their employees who wilfully violate the provisions of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than one year, or both.

(C) The payment of any fines does not in any way excuse or exempt any person required to file from the filing requirements of this chapter.

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§ 8-13-100. Definitions.

As used in Articles 1 through 11:

(1)(a) "Anything of value" or "thing of value" means:

(i) a pecuniary item, including money, a bank bill, or a bank note;

(ii) a promissory note, bill of exchange, an order, a draft, warrant, check, or bond given for the payment of money;

(iii) a contract, agreement, promise, or other obligation for an advance, a conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money;

(iv) a stock, bond, note, or other investment interest in an entity;

(v) a receipt given for the payment of money or other property;

(vi) a chose-in-action;

(vii) a gift, tangible good, chattel, or an interest in a gift, tangible good, or chattel;

(viii) a loan or forgiveness of indebtedness;

(ix) a work of art, an antique, or a collectible;

(x) an automobile or other means of personal transportation;

(xi) real property or an interest in real property, including title to realty, a fee simple or partial interest in realty including

present, future, contingent, or vested interests in realty, a leasehold interest, or other beneficial interest in realty;

(xii) an honorarium or compensation for services;

(xiii) a promise or offer of employment;

(xiv) any other item that is of pecuniary or compensatory worth to a person.

(b) "Anything of value" or "thing of value" does not mean:

(i) printed informational or promotional material, not to exceed ten dollars in monetary value;

(ii) items of nominal value, not to exceed ten dollars, containing or displaying promotional material;

(iii) a personalized plaque or trophy with a value that does not exceed one hundred fifty dollars;

(iv) educational material of a nominal value directly related to the public official's, public member's, or public employee's official responsibilities;

(v) an honorary degree bestowed upon a public official, public member, or public employee by a public or private university or college;

(vi) promotional or marketing items offered to the general public on the same terms and conditions without regard to status as a public official or public employee; or

(vii) a campaign contribution properly received and reported under the provisions of this chapter.

(2) "Appropriate supervisory office" means:

(a) the State Ethics Commission for all persons required to file reports under this chapter except for those members of or candidates for the office of State Senator or State Representative;

(b) the Senate Ethics Committee for members of or candidates for the office of State Senator and the House of Representatives Ethics Committee for members of or candidates for the office of State Representative.

(3) "Business" means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

(4) "Business with which he is associated" means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(5) "Candidate" means a person who seeks appointment, nomination for election, or election to a state or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election. "Candidate" does not include a person within the meaning of Section 431(b) of the Federal Election Campaign Act of 1976.

(6) "Compensation" means money, anything of value, an in-kind contribution or expenditure, or economic benefit conferred on or received by a person.

(7) "Confidential information" means information, whether transmitted orally or in writing, which is obtained by reason of the public position or office held and is of such nature that it is not, at the time of transmission, a matter of public record or public knowledge.

(8) "Consultant" means a person, other than a public official, public member, or public employee who contracts with the State, county, municipality, or a political subdivision thereof to:

(a) evaluate bids for public contracts, or

(b) award public contracts.

(9) "Contribution" means a gift, subscription, loan, guarantee upon which collection is made, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit of money or anything of value made to a candidate or committee, as defined in Section 8-13-1300(6), for the purpose of influencing an election; or payment or compensation for the personal service of another person which is rendered for any purpose to a candidate or committee without charge. "Contribution" does not include volunteer personal services on behalf of a candidate or committee for which the volunteer receives no compensation from any source.

(10) "Corporation" means an entity organized in the corporate form under federal law or the laws of any state.

(11)(a) "Economic interest" means an interest distinct from that of the general public in a

purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

(12) "Election" means:

(a) a general, special, primary, or runoff election;

(b) a convention or caucus of a political party held to nominate a candidate; or

(c) the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States or the Constitution of this State.

(13) "Elective office" means an office at the state, county, municipal, or political subdivision level. For the purposes of Articles 1 through 11, the term "elective

office" does not include an office under the unified judicial system except that for purposes of campaign practices, campaign disclosure, and disclosure of economic interests, "elective office" includes the office of probate judge.

(14) "Expenditure" means a purchase, payment, loan, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit, transfer of funds, a gift of money, or anything of value for any purpose.

(15) "Family member" means an individual who is:

(a) the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild;

(b) a member of the individual's immediate family.

(16) "Gift" means anything of value, including entertainment, food, beverage, travel, and lodging given or paid to a public official, public member, or public employee to the extent that consideration of equal or greater value is not received. A gift includes a rebate or discount on the price of anything of value unless it is made in the ordinary course of business without regard to that person's status. A gift does not include campaign contributions accepted pursuant to this chapter.

(17) "Governmental entity" means the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. "Governmental entity" also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational

institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.

(18) "Immediate family" means:

(a) a child residing in a candidate's, public official's, public member's, or public employee's household;

(b) a spouse of a candidate, public official, public member, or public employee; or

(c) an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.

(19) "Income" means the receipt or promise of any consideration, whether or not legally enforceable.

(20) "Individual" means one human being.

(21) "Individual with whom he is associated" means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(22) "Loan" means a transfer of money, property, guarantee, or anything of value in exchange for an obligation, conditional or not, to repay in whole or in part.

(23) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

(24) "Person" means an individual, a proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, an estate, a company, committee, an association, a corporation, club, labor organization, or any other organization or group of persons acting in concert.

(25) "Public employee" means a person employed by the State, a county, a municipality, or a political subdivision thereof.

(26) "Public member" means an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

(27) "Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. "Public official" does not mean a member of the judiciary except that for the purposes of campaign practices, campaign disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

(28) "Represent" or "representation" means making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division,

bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

(29) "Substantial monetary value" means a monetary value of five hundred dollars or more.

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§ 9-1-10. Definitions.

The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) *"Retirement System"* or *"System"* shall mean the South Carolina Retirement System established under § 9-1-20;

(2) *"Public school"* shall mean any day school conducted within the State under the authority and supervision of a duly elected or appointed city, district or county school board;

(3) *"Teacher"* shall mean any teacher, helping teacher, attendance teacher, librarian, principal, supervisor, superintendent of public schools, superintendent of public instruction, county superintendent of education, person employed in the office of a county superintendent of education, bus driver and any other person employed in the public schools supported by the State, counties and school districts;

(4) *"Employee"* shall mean (a) to the extent he is compensated by the State, any employee, agent or officer of the State or any of its departments, bureaus and institutions, other than the public schools, whether such employee is elected, appointed or employed, (b) the president, any dean, professor or teacher or any other person employed in any college, university or educational institution of higher learning supported by and under the control of the State, (c) any agent or officer of any county, municipality or school district, or of any agency or department thereof, which shall have been admitted to the System under the provisions of § 9-1-470, to the extent he is compensated for services from public funds, (d) any employee of the extension service and any other employee a part of whose salary or wage is paid by the Federal Government if the Federal funds from which such salary or wage is paid shall before disbursement be and become State funds and (e) any employee of any service organization, the membership of which is composed solely of persons eligible to be teachers or employees as defined by this section, if the compensation received by the employees of such service organizations shall be provided from moneys paid by the members as dues or otherwise or from funds derived from public sources and if the employee contributions prescribed by this Title shall be paid from the funds of the service organization; the word

"employee" shall not include Supreme and circuit court Judges;

(5) *"Employer"* shall mean the State, a county board of education, a district board of trustees, a city board of education, the board of trustees or other managing board of any State-supported college or educational institution or any other agency of the State by which a teacher or employee is paid; the term *"employer"* shall also include any county, municipality or other political subdivision of the State, or any agency or department thereof, which shall have been admitted to the System under the provisions of § 9-1-470 or any service organization referred to in paragraph (4) of this section;

(6) "Member" shall mean any teacher or employee included in the membership of the System as provided in Article 5 of this chapter and for the purpose of establishing additional service it shall mean in service;

(7) *"Board"* shall mean the State Budget and Control Board which shall act under the provisions of this chapter through its division of personnel administration;

(8) *"Medical Board"* shall mean the board of physicians provided for in § 9-1-220;

(9) *"Service"* shall mean service as a teacher or employee rendered to and paid for by an employer;

(10) *"Prior service"* shall mean service rendered as a teacher or employee prior to the date

of membership for which credit is allowable under Article 7 of this chapter;

(11) *"Membership service"* shall mean service as a teacher or employee rendered while a member of the System;

(12) *"Creditable service"* shall mean prior service plus membership service for which credit is allowable as provided in Article 7 of this chapter;

(13) *"Beneficiary"* shall mean any person in receipt of a pension, an annuity, a retirement allowance or other benefit provided under the System;

(14) *"Regular interest"* shall mean interest compounded annually at such rate as shall be determined by the Board in accordance with § 9-1-280;

(15) *"Accumulated contribution"* shall mean the sum of all the amounts deducted from the compensation of a member and credited to his individual account in the employee annuity savings fund, together with regular interest thereon, as provided in Article 9 of this chapter;

(16) *"Earnable compensation"* shall mean the full rate of the compensation that would be payable to a teacher or employee if he worked for his full normal working time; when compensation includes maintenance, fees and other things of value the Board shall fix the value of that part of the compensation not paid in money directly by the employer;

(17) "Average final compensation" with respect to those members retiring on or after July 1, 1970, shall mean the average annual earnable compensation of a member during the three consecutive fiscal years of his creditable service on which regular contributions as a member were made to the System producing the highest such average; an amount up to and including forty-five days termination pay for unused annual leave may be added to the pay period immediately prior to retirement and included in the average as applicable. Average final compensation for an elected official may be calculated as the average annual earnable compensation for the thirty-six consecutive months prior to the expiration of his term of office;

(18) *"Employee annuity"* shall mean annual payments for life derived from the accumulated contributions of a member;

(19) *"Employer annuity"* shall mean annual payments for life derived from money provided by the employer;

(20) *"Retirement allowance"* shall mean the sum of the employer annuity and the employee annuity or any optional benefit payable in lieu thereof;

(21) *"Retirement"* shall mean the withdrawal from active service with a retirement allowance granted under the System;

(22) *"Employee annuity reserve"* shall mean the present value of all payments to be made on account of an employee annuity or

benefit in lieu thereof, computed on the basis of such mortality tables as shall be adopted by the Board and regular interest;

(23) *"Employer annuity reserve"* shall mean the present value of all payments to be made on account of an employer annuity or benefit in lieu thereof, computed upon the basis of such mortality tables as shall be adopted by the Board and regular interest; and

(24) *"Actuarial equivalent"* shall mean a benefit of equal value when computed upon the basis of such mortality tables as shall be adopted by the Board and regular interest.

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§ 9-1-20. South Carolina Retirement System created; System shall have powers and privileges of corporation; purposes of System.

A retirement system is hereby established and placed under the management of the State Budget and Control Board for the purpose of providing retirement allowances and other benefits for teachers and employees of the State and political subdivisions or agencies or departments thereof. The System so created shall have the power and privileges of a corporation and shall be known as the South Carolina Retirement System, and by such name all of its business shall be transacted, all of its funds invested and all of its cash, securities and other property held.

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§ 15-78-10. Short title.

This chapter may be cited as the "South Carolina Tort Claims Act".

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§ 15-78-20. Legislative findings; declaration of public policy; extent of, and construction of, waiver of immunity.

(a) The General Assembly finds that while a private entrepreneur may be readily held liable for negligence of his employees within the chosen ambit of his activity, the area within which government has the power to act for the public good has been without limit and, therefore, government did not have the duty to do everything which might have been done. The General Assembly further finds that each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities. Thus, while total immunity from liability on the part of the government is not desirable, see McCall v. Batson, neither should the government be subject to unlimited nor unqualified liability for its actions. The General Assembly recognizes the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions. Additionally, the General Assembly recognizes the impossibility of insuring for acts retrospectively. The General Assembly seeks an orderly transition to the

recognition of individuals' rights against the tortious sovereign as defined herein. Consequently, it is declared to be the public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of this chapter and in accordance with the principles established herein. It is further declared to be the public policy of the State of South Carolina that to insure an orderly transition from sovereign immunity to qualified and limited liability that the General Assembly intends to provide for liability on the part of the State and its political subdivisions only from July 1, 1986, forward in prospective fashion. No governmental entity which was not insured at the time of the injury for which compensation is sought is liable under this chapter and those which were insured are liable only to the extent provided herein. Liability for acts or omissions under this chapter is based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.

(b) The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil

remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).

(c)(i) As to those causes of action that arise or accrue prior to the effective date of this act, the General Assembly reinstates sovereign immunity on the part of the State, its political subdivisions and employees, while acting within the scope of official duty provided that sovereign immunity will not bar recovery in any case of action arising or accruing on or before the effective date of this act if the defendant maintained liability insurance coverage.

(ii) In such cases involving governmental health care facilities, as defined in § 15-78-30(j), recovery shall not exceed the limits of the liability insurance coverage up to a maximum recovery of five hundred thousand dollars.

(iii) In all other such cases recovery shall not exceed the limits of the liability insurance coverage.

(d) Nothing in this chapter affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract.

(e) Nothing in this chapter is construed as a waiver of the state's or political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina.

(f) The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its

political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State.

(g) The General Assembly recognizes the competing interests of either providing physicians and dentists qualified immunity under the provisions of the South Carolina Tort Claims Act or continuing unqualified liability for medical malpractice actions brought against governmentally employed physicians or dentists. While patients deserve accountable and competent health care, regardless of the public or private character of the provider, governmental entities, in order to attract qualified physicians and dentists, must be able to offer an affordable compensation and employment package, including liability insurance. The General Assembly, in amending this chapter, intends to provide an orderly transition from noninclusion to inclusion of physicians and dentists under the provisions of this chapter. Additionally, the liability limits, and hence mandated insurance coverage, of governmental entities for acts of physicians or dentists, acting within the scope of their profession, are set somewhat higher than those provided for other types of governmental liability. These higher limits and mandated coverages are recognition by the General Assembly of significantly higher damages in cases of medical malpractice. To this end, inclusion of physicians and dentists within this chapter has been delayed until January 1, 1989, when an affordable program of group liability insurance will be instituted.

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§ 15-78-30. Definitions.

(a) "Agency" means the individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college, which employs the employee whose act or omission gives rise to a claim under this chapter.

(b) "Claim" means any written demand against the State of South Carolina or a political subdivision for money only, on account of loss, caused by the tort of any employee of the State or a political subdivision while acting within the scope of his official duty.

(c) Prior to January 1, 1989, "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation, but the term does not include an independent contractor doing business with the State or any political subdivision thereof. Custody of prisoners by the State or any of its political subdivisions does not in and of itself create an employer and employee relationship between the State and the prisoner. Provided, the provisions of this section shall in no way limit or modify the liability of a licensed physician or dentist, acting within the scope of his profession.

On or after January 1, 1989, "Employee" means any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law

enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty, whether with or without compensation, but the term does not include an independent contractor doing business with the State or any political subdivision thereof. Custody of prisoners by the State or any of its political subdivisions does not in and of itself create an employer and employee relationship between the State and the prisoner. Provided, the provisions of this section shall in no way limit or modify the liability of a licensed physician or dentist, acting within the scope of his profession, with respect to any action or claim brought hereunder which involved services for which the physician or dentist was paid, should have been paid, or expected to be paid at the time of the rendering of the services from any source other than the salary appropriated by the governmental entity.

(d) "Governmental entity" means the State and its political subdivisions.

(e) "State" means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges.

(f) "Loss" means bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in

actions for negligence, but does not include the intentional infliction of emotional harm.

(g) "Occurrence" means an unfolding sequence of events which proximately flow from a single act of negligence.

(h) "Political subdivision" means the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof.

(i) "Scope of official duty" or "scope of state employment" means (1) acting in and about the official business of a governmental entity and (2) performing official duties.

(j) "Governmental health care facility" means one which is operated by the State or a political subdivision through a governing board appointed or elected pursuant to statute or ordinance and which is tax-exempt under state and federal laws as a governmental entity and from which no part of its net income from its operation accrues to the benefit of any individual or nongovernmental entity. Health care facility includes any facility as defined in Title 44, S.C. Code Ann. for the provision of mental or physical care to individuals, whether or not it is required to be licensed under those provisions.

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§ 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.

The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

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§ 15-78-100. When and where to institute action; requirement of special verdict specifying proportionate liability of multiple defendants.

(a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

(b) Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred.

(c) In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of

fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

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§ 15-78-110. Statute of limitations.

Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter when the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

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§ 30-4-15. Findings and purpose.

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or

delay to the persons seeking access to public documents or meetings.

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§ 30-4-20. Definitions.

(a) "Public body" means any department of the State, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

(b) "Person" includes any individual, corporation, partnership, firm, organization or association.

(c) "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or

characteristics prepared, owned, used, in the possession of, or retained by a public body. Records such as income tax returns, medical records, hospital medical staff reports, scholastic records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or record which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, and other records which by law are required to be closed to the public are not considered to be made open to the public under the provisions of this act; nothing herein authorizes or requires the disclosure of those records where the public body, prior to January 20, 1987, by a favorable vote of three-fourths of the membership, taken after receipt of a written request, concluded that the public interest was best served by not disclosing them. Nothing herein authorizes or requires the disclosure of records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law.

(d) "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss

or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.

(e) "Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

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§ 30-4-30. Right to inspect or copy public records; fees; notification as to public availability of records; presumption upon failure to give notice.

(a) Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.

(b) The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records. Fees charged by a public body must be uniform for copies of the same record or document. However, members of the General Assembly may receive copies of records or documents at no charge from public bodies when their request relates to their legislative duties. The records must be furnished at the lowest possible cost to the person requesting the records. Records must be provided in a form that is both convenient and practical for use by the person requesting copies of the records concerned, if it is equally convenient for the public body to provide the records in this form. Documents may be furnished when appropriate without

charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public. Fees may not be charged for examination and review to determine if the documents are subject to disclosure. Nothing in this chapter prevents the custodian of the public records from charging a reasonable hourly rate for making records available to the public nor requiring a reasonable deposit of these costs before searching for or making copies of the records.

(c) Each public body, upon written request for records made under this chapter, shall within fifteen days (excepting Saturdays, Sundays, and legal public holidays) of the receipt of any such request notify the person making such request of its determination and the reasons therefor. Such a determination shall constitute the final opinion of the public body as to the public availability of the requested public record and, if the request is granted, the record must be furnished or made available for inspection or copying. If written notification of the determination of the public body as to the availability of the requested public record is neither mailed nor personally delivered to the person requesting the document within the fifteen days allowed herein, the request must be considered approved.

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§ 42-7-10. Establishment of State Accident Fund; contents.

(A) There is established as a separate agency of state government a separate fund to be known as the State Accident Fund, hereinafter referred to as the "fund" or "state fund" in this article. This fund consists of annual premium charges, recoveries from the Second Injury Fund, recoveries by subrogation and, subject to subsection (B) of this section, of all income or revenue derived from investing these funds. Receipts for the credit of the fund and expenditures from the fund must be handled in the manner provided by law governing all state funds.

(B) One-third of the investment income generated in Fiscal Year 1990-91 and two-thirds of the income generated in Fiscal Year 1991-92 must be credited to the state fund in those years respectively. Thereafter all such income must be credited to the state fund except that the State Treasurer may charge the state fund, and credit to the general fund, the customary investment management fee.

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§ 42-7-40. Application to State.

This article shall apply to the State including the State Guard and the National Guard.

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§ 42-7-60. Officers and employees covered by article.

Notwithstanding anything to the contrary contained in § 42-1-130, the provisions of this article apply to all officers and employees of the State and of any county, municipality, or other political subdivision thereof or any agency or institution of the State which has elected to participate under this article under the provisions of § 42-7-50.

In cases of officers or employees who are on a partial or total fee basis or whose official duties require only part time the director may fix, for the purpose of this article, the average weekly wage of this officer or employee, not in excess of forty dollars and collect charges from the employer of this officer or employee on the basis of the average weekly wage so fixed.

Any client of the state agency of Vocational Rehabilitation, while involved in a program of assessment or work adjustment as defined in this section, who suffers an injury for which compensation is specifically prescribed in this title, may be awarded and paid compensation under the provisions of this title. For purposes of this section, "a client involved in a program of assessment or work adjustment" is defined as any client performing work tasks which are part of the program of Vocational Rehabilitation services for the individual and who in turn receives wage payments from the agency for the work performed.

Students of high schools, state technical schools, and state-supported colleges and universities while engaged

in work study, distributive education, or apprentice programs on the premises of private companies are also covered by the provisions of this title.

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§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Council shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production

of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the Council

finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the Council shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens of the State. When applicable, joint public hearings will be held in conjunction with any such hearings required by the U.S. Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the Council, the Council may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The Council shall act upon an application for a permit within ninety days after the application is filed. *Provided*, however, that in the case of minor developments, as defined in § 48-39-10, the Council shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the Council shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by the granting of the permit has the right of direct appeal to the Council. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the Council.

(F) Work authorized by permits issued hereunder shall be completed within three years after the date of issuance of the permit. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress.

§ 48-39-150. Approval or denial of permits; appeal to Council [For subsections (A)-(E), see bound volume.]

(F) Work authorized by permits issued under this chapter must be completed within five years after the date of issuance. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress. An extension only may be granted if the permitted project meets the policies and regulations in force when the extension is requested or the permittee agrees to accept additional conditions which would bring the project into compliance. The time periods required by this subsection must be tolled during the pendency of an administrative or a judicial appeal of the permit issuance.

[From and after July 1, 1994, this section reads as follows:]

(A) In determining whether a permit application is approved or denied the department shall base its determination on the individual merits of each application, the policies specified in Sections 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the department prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and

submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the department finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the department feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the department shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens

of the State. When applicable, joint public hearings will be held in conjunction with any such hearings required by the U. S. Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the department, the department may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The department shall act upon an application for a permit within ninety days after the application is filed. Provided, however, that in the case of minor developments, as defined in Section 48-39-10, the department shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the department shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by the granting of the permit has the right of direct appeal from the decision of the Administrative Law Judge to the Coastal Zone Management Appellate Panel. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the department.

(F) Work authorized by permits issued under this chapter must be completed within five years after the

date of issuance. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress. An extension only may be granted if the permitted project meets the policies and regulations in force when the extension is requested or the permittee agrees to accept additional conditions which would bring the project into compliance. The time periods required by this subsection must be tolled during the pendency of an administrative or a judicial appeal of the permit issuance

(4)

Supreme Court, U.S.
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No. 94-428

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF UNDER RULE 15.7

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SUPPLEMENTAL ARGUMENT

I. THE DECISION IN THE PENDING HESS CASE MAY HAVE A BEARING ON THE CONFLICT PRESENTED BY THE RISTOWS' PETITION

A. INTRODUCTION

Recently, after the preparation of their Petition for Certiorari, the petitioners, Fred W. Ristow and Susan M. Ristow, learned of the existence of two consolidated cases pending before the United States Supreme Court, the decision of which may have a bearing on the issues in the case at hand. These cases are Hess v. Port Authority Trans-Hudson Corp. and Walsh v. Port Authority Trans-Hudson Corp., Supreme Court Docket No. 93-1197. The Ristows now file this Supplemental Brief pursuant to Supreme Court Rule 15.7.

B. THE HESS LITIGATION

On March 21, 1994, the Supreme Court

granted certiorari in these consolidated cases to review a decision of the Third Circuit entered on September 30, 1993. Certiorari was granted to review whether the Port Authority Trans-Hudson Corp., hereinafter referred to as PATH, is entitled to Eleventh Amendment immunity. Hess and Walsh, ____ U.S. ____, 114 S. Ct. 1292, 127 L. Ed. 2d 646 (1994).

The Third Circuit summarily affirmed, by a judgment order, without comment or analysis, the decisions of the United States District Court for the District of New Jersey in Hess which is reported at 809 F. Supp. 1172 (D.N.J. 1992) and in Walsh which is reported at 813 F. Supp. 1095 (D.N.J. 1993). The Court of Appeals' decision is reported in the table at 8 F. 3d 811 (3rd Cir. 1993). The details of the District

Court decisions will be discussed later. Briefs have been filed by the parties and amici curiae, and oral argument is scheduled to be heard on October 3, 1994.

C. SUMMARY OF PRIOR PATH LITIGATION AND ITS RELATIONSHIP TO THE RISTOWS' CASE

PATH and its parent, the Port Authority of New York and New Jersey, are bi-state entities, and they have previously been the subject of Eleventh Amendment litigation which has been cited and utilized extensively by the Ristows at the Fourth Circuit level and in their Petition for Certiorari. The differing approaches utilized by the Second Circuit in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir. 1989), aff'd on other grds 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264

(1990) and by the Third Circuit in Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey, 819 F. 2d 413 (3rd Cir. 1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987), to analyze the important financial factor in the sovereign immunity equation illustrate the existence of the actual financial analysis/broad financial approach conflict that forms the basis of the Ristows' Petition for Certiorari. (Petition, p. 22-35) In Feeney, the Second Circuit denied Eleventh Amendment immunity, while the Third Circuit reached the opposite result in Police Benevolent Association. (Petition, p. 23, 26)

The Supreme Court in Port Authority Trans-Hudson v. Feeney, 495 U.S. 299,

306-309, 110 S. Ct. 1868, 19 L. Ed. 2d 264, 273-275 (1990), resolved the conflict as to the Authority's status on alternative grounds finding that if the entity is entitled to sovereign immunity such immunity has been expressly waived. (Petition, p. 28-29) Thus, the issue as to whether the Authority is entitled to sovereign immunity and the underlying conflict as to the proper approach to be utilized in analyzing the financial factor remained unresolved by the Court. (Petition, p. 29) In arguing against sovereign immunity for the South Carolina State Ports Authority, the Ristows relied heavily on the actual financial analysis approach employed by the Second Circuit in Feeney and utilized by other Circuits as well. (Petition, p. 13-14, 25-28) Although admitting the Ristows'

financial arguments found support in Feeney, the Fourth Circuit was persuaded by the broad approach taken by the Third Circuit in Police Benevolent Association. (Petition, p. 14)

D. DISTRICT COURT HOLDINGS IN HESS AND WALSH

After the Supreme Court's waiver ruling, the Eleventh Amendment immunity issue concerning PATH and its parent would have appeared to be a moot point. However, the decisions of the United States District Court for the District of New Jersey in Hess and Walsh, and the Third Circuit's affirmance thereof, caused the issue to surface once again. In those cases, the District Court assumed PATH was entitled to sovereign immunity, but recognized the express waiver thereof. However, the District Court placed a condition precedent or restric-

tion on such waiver finding it to be effective only if suit was brought within one year of the date of the accident. (Hess petitioners' Main Brief, p. 9) Since Hess and Walsh failed to bring their actions within the one year period, their cases were dismissed. (Main Brief, p. 9)

E. A DISCUSSION OF HESS AND ITS POTENTIAL IMPACT ON THE RISTOWS' CASE

Having recently become familiar with the perding Hess litigation and having obtained and reviewed copies of the brief filed therein, the Ristows recognize that a decision in Hess may resolve the conflict in analyzing the important financial factor presented by their petition. The Ristows will now briefly discuss the Hess litigants respective positions.

1. THE HESS PETITIONERS'POSITION

The Hess petitioners' primary argument appears to be that PATH is not entitled to Eleventh Amendment immunity due to its character as a bi-state agency created by interstate compact and the particular facts surrounding its creation. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L. Ed. 2d 401 (1979) is believed to have established a presumption against Eleventh Amendment immunity for entities created by interstate compact. (Main Brief, p. 13-14) According to Lake Country, an entity created by interstate compact cannot be afforded the protection of the Eleventh Amendment unless there is "good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States

themselves, and that Congress concurred in that purpose..." Lake Country, 440 U.S. at 401. Such presumption is consistent with the constitutional plan under which states in creating an interstate compact entity surrender their sovereignty as it relates to that entity. (Main Brief, p. 13-17)

The Hess petitioners then discuss extensively the reasons why the entity was not structured to enjoy immunity. (Main Brief, p. 17-32) These are briefly summarized as follows:

a. the compact language creating the Authority and Congressional consent provisions manifest an intent that it not be considered a State entity and entitled to Eleventh Amendment immunity; (Main Brief, p. 17-26)

b. the Authority characterizes itself as a political subdivision, has a separate legal identity and powers similar to a political subdivision, and is not subject to State control; (Main Brief, p. 26-32)

As additional support for the denial of immunity, the Hess petitioners argue that the financial factor favors the denial of immunity. (Main Brief, p. 33-38) Like the Ristows, they contend the Eleventh Amendment's purpose is to protect the state treasury from liability (Main Brief, p. 33-34) Using an actual financial analysis similar to the Ristows' approach, the Hess petitioners then discuss how the state treasuries of New York and New Jersey are protected from any judgment against PATH. (Main Brief, p. 34-38) PATH has its own funds

and is self-sustaining; it cannot pledge the credit of either State. (Main Brief, p. 34-37) Any appropriation by the States for a judgment against PATH is discretionary, and such voluntary appropriation does not trigger Eleventh Amendment protection. (Main Brief, p. 37-38) PATH has insurance. (Main Brief, p. 38)

On reply, the Hess petitioners again stress the importance of the financial factor as an alternative to their interstate compact arguments. (Reply Brief, p. 12-19) The Hess petitioners' financial arguments are clearly very similar to the Ristows'.

2. PATH'S POSITION

PATH's response is basically twofold: 1) it argues that the Port Authority was created to be immune and the

application of the Lake Country factors demonstrates this; 2) it takes issue with the petitioners' interpretation of the Eleventh Amendment which focuses on the protection of the state treasury from liability. (PATH's Brief, p. 4-34) PATH believes none of the factors set forth in Lake Country is pre-eminent or controlling. (PATH's Brief, p. 6) It argues the Port Authority was created as an immune state agency, not a political subdivision, and cites state case law to support its position. (PATH's Brief, p. 6-12) PATH contends it is administered as a state agency and performs state functions. (PATH's Brief, p. 12-22)

With respect to the important financial factor, PATH makes an argument strikingly similar to the broad financial approach discussed by the Ristows

in their Petition. (PATH's Brief, p. 22-27) Despite the insulation provisions, PATH believes the financial factor favors Eleventh Amendment immunity. PATH assets are held for the benefit of the people of the States. (PATH's Brief, p. 22-23) There is a close financial relationship between the States and the Port Authority; it was supported by State appropriations in its early years, a general reserve fund was required, and the States had access to surplus revenues to be used for other purposes. (PATH's Brief, p. 23-25)

> PATH alleges:
> "Money being fungible, the unavailability of Port Authority funds as a result, for example, of having to pay a money judgment would mean that the two States would have to look to their general treasuries to fund important projects or else deny the public the benefit of such services. In that sense, then, the Port Authority's mon-

> ey is a component of a "state treasury" since Port Authority money is being used for the benefit of the people of the two States for projects which must be authorized by their Legislatures." (PATH's Brief, p. 25-26)

PATH takes an expansive view of the "state treasury" in its analysis.

There is no doubt PATH's financial approach is virtually identical to that utilized by the Third Circuit in Police Benevolent Association and by the Fourth Circuit in the Ristows' case. It clearly illustrates the broad financial approach discussed by the Ristows. In its final argument, PATH disputes the Hess petitioners' view of the state treasury and attempts to de-emphasize the importance of the financial factor in an Eleventh Amendment analysis. (PATH's Brief, p. 28-34)

3. THE AMICI STATES' POSITION

The amici States argue that the Court's Eleventh Amendment jurisprudence has immunized the States regardless of whether a money judgment payable from the state treasury was involved. (States' Brief, p. 6-15) In these States' opinion, the proper test for determining if a state agency is the state's alter ego for Eleventh Amendment purposes is whether the state controls the agency and the agency acts to further state policies. (States' Brief, p. 15) These States discuss the multiplicity of alter ego tests and believe they have produced inconsistent results. (States' Brief, p. 18-21)

The conflicting approaches in analyzing the important financial factor discussed by the Ristows in their Peti-

tion are essentially recognized by the States in their examination of the confusion as to the Authority's status illustrated by the decision of the Second Circuit in Feeney and the Third Circuit in Police Benevolent Association. (States Brief, p. 19-20) These States criticize the treasury factor and its pre-eminence and believe the state control test should be assigned the preeminent role in an Eleventh Amendment analysis. (State's Brief, p. 21-28)

4. THE AMICI COUNCIL'S POSITION

In the amicus brief filed by the Council of State Governments and others, these amici argue that the States' immunity from suit in federal court is an attribute of state sovereignty possessed by them when they joined the Union. (Council's Brief, p. 6) Congress can

abrogate such immunity, but it must unmistakably manifest such intent. (Council's Brief, p. 10-12) If Congress has not spoken with respect to immunity for an interstate agency and that agency performs state functions and remains answerable to the states, it is entitled to a presumption of immunity. (Council's Brief, p. 17-18) The fact that the States intended the entity to enjoy immunity and it remains subject to their control is then determinative. (Council's Brief, p. 18) Such intent and control exists in Hess. (Council's Brief, p. 18-22)

For a variety of reasons, these amici minimize the impact of the financial factor. (Council's Brief, p. 23-25) They also take an expansive view of the state treasury and express a preference

for the broad financial approach.

(Council's Brief, p. 24-25)

F. SUMMARY

A review of the arguments of the parties and amici in Hess reinforces the Ristows' contention in their Petition that a deep conflict exists as to the proper approach to be used in analyzing the important financial factor. The resolution of this conflict by the Court is certainly appropriate.

At this point, the key question is whether the decision in Hess will resolve the conflict as to the financial factor or otherwise provide guidance in the area. Hess, of course, involves a bi-state agency created by interstate compact, while the South Carolina State Ports Authority is an entity created solely by the State of South Carolina.

The Hess petitioners' position is based primarily on interstate compact grounds with reliance on the financial factor to a lesser degree.

In resolving the Hess case, the Court could limit its decision to interstate compact grounds or other grounds unrelated to the financial factor. Or the Court may elect to resolve the financial factor conflict or provide guidance in the area in the Hess decision. Since the Hess decision has the potential to resolve the financial factor conflict raised by the Ristows, it seems appropriate for the determination of the Ristows' case to await the outcome of Hess.

CONCLUSION

In light of the foregoing considerations, the Ristows request the Court to

grant their Petition for Certiorari because it clearly presents Rule 10 considerations and then defer further proceedings until Hess is decided. If such request is not felt to be appropriate, the Ristows then request the Court to defer a decision on whether to grant certiorari in their case pending the outcome in Hess.

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No. 94-428

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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The Ristows' Petition for Certiorari and Appendix, Supplemental Brief and the Authority's Brief in Opposition and Appendix are cited throughout this Reply.

REPLY ARGUMENT

I. THE AUTHORITY'S BRIEF PRESENTS NO REASONS FOR DENYING CERTIORARI IN THIS CASE.

A. INTRODUCTION AND GENERAL REPLY

In their Petition for Certiorari, the Ristows have shown the existence of a genuine conflict, or at least an important unsettled question of federal law, concerning the important financial factor in an Eleventh Amendment analysis which clearly meets the criteria for Supreme Court review under Rule 10.1. (Petition, p.22-30) The Ristows have also outlined in summary fashion the underlying merits of their position and the error of the Fourth Circuit's decision. Under Rule 15.1, the respondent in its Brief in Opposition is charged with presenting arguments for denying

the petition and identifying perceived misstatements of fact and law.

From a review of the Ports Authority's Opposition Brief, it is apparent that the respondent has confused a respondent's brief in opposition to certiorari with a responsive brief on the merits of the case. The Authority points out perceived misstatements in the Ristows' Statement of the Case, but it then proceeds to respond primarily to the underlying merits of petitioners' case and only briefly mentions the conflict concerning the important financial factor in Section IV of its Brief. The Authority's Brief has done nothing to disprove the existence of the conflict, and its arguments fail to show why certiorari is not appropriate.

B. THE CONFLICT AND THE AUTHORITY'S RESPONSE THERETO

On pages 22 through 30 of their Petition, the Ristows have outlined the conflicting approaches utilized by the appellate courts to analyze the important financial factor. The broad approach is shown by the reasoning of the Third Circuit in Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey, 819 F. 2d 413 (3rd Cir.1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987), which the Fourth Circuit utilized in its decision. (See App. A15-17 and Petition, p. 22-24) The Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir, 1989), aff'd on other grounds 495 U.S. 299, 110 S. Ct. 1868,

109 L. Ed. 2d 264 (1990), illustrates the actual financial analysis approach that the Ristows have relied upon throughout this litigation. (Petition, p. 25-28)

As discussed in the Ristows' Supplemental Brief, the conflict is also seen in the respective positions of the parties and amici in the pending cases of Hess v. Port Authority Trans-Hudson Corp., and Walsh v. Port Authority Trans-Hudson Corp., Supreme Court Docket No. 93-1197. (Supp. Brief, p.7-18) Not surprisingly, the Authority mentions the Ristows' Supplemental Brief only once thus trying to ignore Hess entirely.

In Section IV of its Brief, the Ports Authority claims the Ristows have tried to create the appearance of a conflict, but such conflict has been re-

solved. The Authority's arguments reflect an erroneous analysis of the situation concerning the Port Authority Trans-Hudson.

In Port Authority Trans-Hudson v. Feeney, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990), the Supreme Court never resolved the conflict between the Second and Third Circuits as to the Authority's status and the underlying question regarding which analysis of the financial factor was proper for an Eleventh Amendment determination. (Petition, p. 28-29) The Court instead chose to affirm on alternative grounds finding that if the Authority was entitled to immunity the same has been expressly waived. Port Auth. Trans-Hudson, 495 U.S. at 306-309 (petition,p.29) Four Justices, in a concurring opinion, how-

ever, believed the Authority was not entitled to Eleventh Amendment immunity. Port Auth. Trans-Hudson, 495 U.S. at 309-318 (Petition, p.34-35)

While the Court probably believed its waiver decision would prevent future Eleventh Amendment litigation concerning the Authority, the determinations of the District Court for the District of New Jersey in Hess v. Port Auth. Trans-Hudson Corp, 809 F. Supp. 1172 (D.N.J. 1992) and Walsh v. Port Auth Trans-Hudson Corp., 813 F. Supp 1095 (D.N.J. 1993) have caused the issue of the Authority's status and the underlying conflict as to the financial factor to surface once again. (Supp. Brief, p. 6-7) Had the Court actually resolved the conflict as to the financial factor and the Authority's status in the 1990 Port

Auth. Trans-Hudson case, it would have been unnecessary for the Court to review Hess. (Supp. Brief, p. 6-7) The respondent either fails to understand this or conveniently chooses to ignore it. The litigation surrounding the Port Authority Trans-Hudson, together with the other cases cited by the Ristows on pages 25 through 30 of their Petition, clearly illustrates the financial factor conflict existing today in the federal judicial system.

The Authority on page 19 recites the fact that the New York/New Jersey Port Authority is a bi-state entity, while the respondent is a single state creature. Such difference is not relevant since a review of the litigation surrounding the Port Authority Trans-Hudson as well as the cases cited by the Ris-

tows on pages 18 through 30 of their Petition, particularly Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391,99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) shows that the important financial factor has been utilized in cases involving single state and bi-state entities.

On page 20, the Authority argues that the Fourth Circuit was correct in using a broader financial approach than used by the Second Circuit in Feeney because the presumption against Eleventh Amendment immunity for interstate compact entities does not exist in this case. The Ristows believe the absence of such interstate compact presumption in this case does not justify using the broad financial approach. Furthermore, in making this statement, the Authority

has, in fact, acknowledged the very presence of the financial factor conflict.

C. REPLY CONCERNING STATEMENT OF THE CASE

In the remainder its Brief, the Authority discusses the Ristows' Statement of the Case and raises arguments concerning the underlying merits of the Ristows' position. The Ristows will first reply to those comments on the Statement of the Case that are believed to require a response. On page 2 of its Brief, the Authority claims the Ristows' description of the Authority is scanty and argumentative. Recognizing that this is a Petition and not a brief on the merits, the Ristows have adequately described the Authority on pages 3 and 4 of their Petition and have fur-

nished the Court with applicable statutory provisions concerning the Authority in Section C of their Appendix. The Ristows have stated the Authority has "highly autonomous powers" and believe the applicable statutes cited support this proposition. (Petition, p.4)

Reviewing the Authority's Statement of the Case on pages 3 through 7 of the Brief, the Ristows note the existence of numerous allegations which are unsupported by any factual reference to the record. For the Court's information, these are taken from Authority affidavits filed at the District Court level. Rather than supporting the Authority's position, these allegations show the existence of considerable autonomy and separate, segregated funds owned by the respondent.

On page 7 of its Brief, the Authority, of course, denies the Ristows' recitation of events and presents what it terms are " "technical corrections" on pages 1-4 of its Appendix. Since this case never reached the discovery stage, the Ristows' description of the incident is based on its verified complaint and the affidavit of Mr. Ristow, both of which are properly referenced. (Petition, p. 5-7) These allegations are presented to familiarize the Court with the petitioners' claim.

The Authority also claims on page 7 that the Ristows have ignored the South Carolina Tort Claims Act. The Ristows, however, have recognized the state forum for their claims, but believe the existence or non-existence of a state forum simply is not a factor in an Eleventh

Amendment analysis. (Petition, p.62-63) In its technical corrections, the Authority again denies the Ristows' description of the incident but then improperly presents an alleged version of the settlement negotiations which is not referenced and is not supported by any pleading, affidavit, or other document in the record. (Auth. App. 1, par. 1-3) The Ristows deny this version.

Additionally, the Authority, for the very first time in this litigation, denies that Lloyds of London is the Authority's insurer and identifies a group of insurers as the Authority's carrier. (Auth. App. 1-4) Quite interestingly, the Authority reveals on App. 4 a limit of "US $20,000,000.00." Assuming this correctly identifies policy limits, the possibility of any liability on the Ris-

tows' claim in excess of policy limits appears to be a moot point.

D. REPLY TO RESPONDENT'S UNDERLYING MERITS ARGUMENTS

The Ristows will now reply to those Authority arguments concerning the merits of their case which are believed to require a response. On page 9 of its Brief, the Authority contends that all the basic questions pertaining to Eleventh Amendment immunity favor a finding of immunity for the Authority. The Ristows' discussion in Section III of their Petition shows the Authority is not entitled to immunity.

On pages 10 and 11, the Authority disputes the Ristows' characterization of the Eleventh Amendment's central goal as being to shield state treasuries from federal court judgments. The Authority

claims none of the cases cited by the Ristows make such a statement or holding. In support of their statement concerning the central goal, the Ristows have cited Jacintoport v. Greater Baton Rouge Port Com., 762 F. 2d 435 (5th Cir. 1985), cert. den. 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986) Edelman v. Jordan, 415 U.S. 651, 97 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) and Fitchik v. New Jersey Transit Rail Operations Inc., 873 F. 2d 655 (3rd Cir. 1989), cert. den. 493 U. S. 850, 1108, Ct. 148, 107 L. Ed. 2d 107(1989). (Petition, p. 21)

Obviously, the Authority has misread these cases since this goal can easily be discerned from a reading of pages 662 and 663 of the Edelman opinion. When identifying the treasury factor as being the most significant inquiry, the Court

in Fitchik notes "... this conclusion is supported by the Supreme Court's identification of the amendment's central goal as the prevention of federal court judgments that must be paid out of the state's treasury." Fitchik, 873 F. 2d at 659-660. Edelman is cited as support for the foregoing quotation. Jacintoport refers to treasury protection as "one of the most important goals of the immunity of the Eleventh Amendment." Jacintoport, 762 F. 2d at 440. The Amendment's historial purpose of protecting the treasuries of the new States from suits to collect Revolutionary War debts further supports the Ristows' position. See Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, n.1, 79 S.Ct. 785, 3 L. Ed. 2d 804 (1959).

In Section II of its Brief, the Authority discusses the significance of the existence of a state forum for the Ristows' claims. Based upon the authorities they have studied, the Ristows believe the existence or nonexistence of a state forum is not a relevant factor in an Eleventh Amendment analysis. In Section III, Part A, the Authority expresses an expansive view of the state treasury. Sections II and III of the Ristows' Petition discuss the problems with the broad financial view and an expansive definition of the state treasury.

The Ristows agree with the Authority's claim in Section III, Part B, that the purchase of insurance is good business practice. As discussed on pages 39-42 of their Petition, it is also an important component in an actual finan-

cial analysis of whether the state treasury will have to pay a judgment. The Authority claims the Courts in Fitchik, cited earlier, Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F. 2d 807 (3rd Cir. 1991), cert. den. _____ U.S. _____, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992), and Royal Caribbean v. Puerto Rico Ports Authority, 973 F. 2d 8 1st Cir. 1992), cited by the Ristows on pages 42 and 43 as support for the importance of insurance coverage, did not consider insurance as a key factor in their decision. While the Courts in these cases commenced their analysis of the tiers of protection by first examining revenues, the presence of insurance was clearly an important factor, particularly in Fitch

ik and Royal Caribbean. See 873 F. 2d at 661 and 973 F. 2d at 11.

In Section III, Part C, the Authority admits there is no continued funding requirement for the Authority, but points out the State's payment on bonds to fund Authority projects. Such payment is purely voluntary, and voluntary payments do not trigger Eleventh Amendment protection as noted on pages 47 and 48 of the Petition.

Finally, in Section III, Part D, the Authority mentions the Fourth Circuit's immunity test and the Court's reliance on decisions of the District Court for South Carolina which have granted immunity to the Authority. The Ristows would direct the Court's attention to Section III of their Petition outlining why this case was wrongly decided and

pages 60-62 discussing the deficiencies of the District of South Carolina's decisions.

CONCLUSION

In their Petition, the Ristows have presented a matter which requires Supreme Court review. The Hess litigation, as discussed in the Supplemental Brief, provides further evidence of the foregoing. The Ristows once again request the Court to grant their Petition for Certiorari and then defer further proceedings until Hess is decided. If such request is not felt to be appropriate, the Ristows then request the Court to defer a decision on whether to grant certiorari in their case pending the outcome in Hess.

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